SUPREME COURT OF CANADA

CITATION: Saskatchewan (Human Rights Commission) *v.* Whatcott, 2013 SCC 11

DATE: 20130227
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BETWEEN:

Saskatchewan Human Rights Commission
Appellant
and
William Whatcott
Respondent
- and -
Attorney General for Saskatchewan, Attorney General of Alberta, Canadian Constitution Foundation, Canadian Civil Liberties Association, Canadian Human Rights Commission, Alberta Human Rights Commission, Egale Canada Inc., Ontario Human Rights Commission, Canadian Jewish Congress, Unitarian Congregation of Saskatoon, Canadian Unitarian Council, Women's Legal Education and Action Fund, Canadian Journalists for Free Expression, Canadian Bar Association, Northwest Territories Human Rights Commission, Yukon Human Rights Commission, Christian Legal Fellowship, League for Human Rights of B'nai Brith Canada, Evangelical Fellowship of Canada, United Church of Canada, Assembly of First Nations, Federation of Saskatchewan Indian Nations, Métis Nation—Saskatchewan, Catholic Civil Rights League, Faith and Freedom Alliance and African Canadian Legal Clinic
Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps,* Fish, Abella, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 207) Rothstein J. (McLachlin C.J. and LeBel, Fish, Abella and Cromwell JJ. concurring)

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* Deschamps J. took no part in the judgment.

Saskatchewan Human Rights Commission *Appellant*

v.

William Whatcott *Respondent*

and

Attorney General for Saskatchewan,
Attorney General of Alberta,
Canadian Constitution Foundation,
Canadian Civil Liberties Association,
Canadian Human Rights Commission,
Alberta Human Rights Commission,
Egale Canada Inc.,
Ontario Human Rights Commission,
Canadian Jewish Congress,
Unitarian Congregation of Saskatoon,
Canadian Unitarian Council,
Women's Legal Education and Action Fund,
Canadian Journalists for Free Expression,
Canadian Bar Association,
Northwest Territories Human Rights Commission,
Yukon Human Rights Commission,
Christian Legal Fellowship,
League for Human Rights of B'nai Brith Canada,
Evangelical Fellowship of Canada,
United Church of Canada,
Assembly of First Nations,
Federation of Saskatchewan Indian Nations,
Métis Nation-Saskatchewan,
Catholic Civil Rights League,
Faith and Freedom Alliance and
African Canadian Legal Clinic *Interveners*

Indexed as: Saskatchewan (Human Rights Commission) *v.* Whatcott

2013 SCC 11

File No.: 33676.

2011: October 12; 2013: February 27.

Present: McLachlin C.J. and LeBel, Deschamps,* Fish, Abella, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Freedom of religion — Hate publications — Whether provincial human rights legislation prohibiting publications that expose or tend to expose to hatred, ridicule, belittle or otherwise affront dignity of persons on basis of prohibited ground infringes guaranteed freedom of religion — If so, whether infringement justified — Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 14(1)(b) — Canadian Charter of Rights and Freedoms, ss. 1, 2(a).

Constitutional law — Charter of Rights — Freedom of expression — Hate publications — Whether provincial human rights legislation prohibiting publications that expose or tend to expose to hatred, ridicule, belittle or otherwise affront dignity of persons on basis of prohibited ground infringes guaranteed freedom

* Deschamps J. took no part in the judgment.

of expression — If so, whether infringement justified — Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 14(1)(b) — Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

Administrative law — Appeals — Standard of review — Human rights tribunal finding that hate publications infringe provincial human rights legislation and that provincial human rights legislation prohibiting hate publications is constitutional — Whether decision reviewable on standard of correctness or reasonableness — Whether tribunal made reviewable error.

Four complaints were filed with the Saskatchewan Human Rights Commission concerning four flyers published and distributed by W. The complainants alleged that the flyers promoted hatred against individuals on the basis of their sexual orientation. The first two flyers were entitled "Keep Homosexuality out of Saskatoon's Public Schools!" and "Sodomites in our Public Schools". The other two flyers were identical to one another and were a reprint of a page of classified advertisements to which handwritten comments were added. A tribunal was appointed to hear the complaints. It held that the flyers constituted publications that contravened s. 14 of *The Saskatchewan Human Rights Code* because they exposed persons to hatred and ridicule on the basis of their sexual orientation, and concluded that s. 14 of the *Code* was a reasonable restriction on W's rights to freedom of religion and expression guaranteed by ss. 2(*a*) and (*b*) of the *Charter*. The Court of Queen's Bench upheld the tribunal's decision. The Court of Appeal

accepted that the provision was constitutional but held that the flyers did not contravene it.

Held: The appeal should be allowed in part.

The definition of "hatred" set out in *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, with some modifications, provides a workable approach to interpreting the word "hatred" as it is used in legislative provisions prohibiting hate speech. Three main prescriptions must be followed. First, courts must apply the hate speech prohibitions objectively. The question courts must ask is whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred. Second, the legislative term "hatred" or "hatred and contempt" must be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects. Third, tribunals must focus their analysis on the effect of the expression at issue, namely whether it is likely to expose the targeted person or group to hatred by others. The repugnancy of the ideas being expressed is not sufficient to justify restricting the expression, and whether or not the author of the expression intended to incite hatred or discriminatory treatment is irrelevant. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination. In light of these three

directives, the term "hatred" contained in a legislative hate speech prohibition should be applied objectively to determine whether a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination.

The statutory prohibition against hate speech at s. 14(1)(*b*) of the *Code* infringes the freedom of expression guaranteed under s. 2(*b*) of the *Charter*. The activity described in s. 14(1)(*b*) has expressive content and falls within the scope of s. 2(*b*) protection. The purpose of s. 14(1)(*b*) is to prevent discrimination by curtailing certain types of public expression.

The limitation imposed on freedom of expression by the prohibition in s. 14(1)(*b*) of the *Code* is a limitation prescribed by law within the meaning of s. 1 of the *Charter* and is demonstrably justified in a free and democratic society. It appropriately balances the fundamental values underlying freedom of expression with competing *Charter* rights and other values essential to a free and democratic society, in this case a commitment to equality and respect for group identity and the inherent dignity owed to all human beings.

The objective for which the limit is imposed, namely tackling causes of discriminatory activity to reduce the harmful effects and social costs of discrimination, is pressing and substantial. Hate speech is an effort to marginalize individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the

majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable groups that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts on a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy.

Section 14(1)(*b*) of the *Code* is proportionate to its objective. Prohibiting representations that are objectively seen to expose protected groups to hatred is rationally connected to the objective of eliminating discrimination and the other harmful effects of hatred. To satisfy the rational connection requirement, the expression captured under legislation restricting hate speech must rise to a level beyond merely impugning individuals: it must seek to marginalize the group by affecting their social status and acceptance in the eyes of the majority. The societal harm flowing from hate speech must be assessed as objectively as possible and the focus must be on the likely effect of the hate speech on how individuals external to the group might reconsider the social standing of the group. Section 14(1)(*b*) of the *Code* reflects this approach. The prohibition only prohibits public communication of hate speech; it does not restrict hateful expression in private communications between individuals. Similarly, the prohibition does not preclude hate speech against an individual on the basis of his or her uniquely personal characteristics, but only on the basis of characteristics that are shared by others and have been legislatively

recognized as a prohibited ground of discrimination. However, expression that "ridicules, belittles or otherwise affronts the dignity of" does not rise to the level of ardent and extreme feelings constituting hatred required to uphold the constitutionality of a prohibition of expression in human rights legislation. Accordingly, those words in s. 14(1)(*b*) of the *Code* are not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups and they unjustifiably infringe freedom of expression. Consequently, they are constitutionally invalid and must be struck from s. 14(1)(*b*).

Section 14(1)(*b*) of the *Code* meets the minimal impairment requirement. Alternatives proposed were to allow the marketplace of ideas to arrive at the appropriate balance of competing rights or to leave the prosecution of hate speech to the criminal law. However, the prohibition in s. 14(1)(*b*) is one of the reasonable alternatives that could have been selected by the legislature. The words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(*b*) are also constitutionally invalid because they do not minimally impair freedom of expression. Once those words are severed from s. 14(1)(*b*), the remaining prohibition is not overbroad, but rather tailored to impair freedom of expression as little as possible. The modified provision will not capture all harmful expression, but it is intended to capture expression which, by inspiring hatred, has the potential to cause the type of harm that the legislation is trying to prevent.

Not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis, since different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. Hate speech is at some distance from the spirit of s. 2(*b*) because it does little to promote, and can in fact impede, the values underlying freedom of expression. Hate speech can also distort or limit the robust and free exchange of ideas by its tendency to silence the voice of its target group. These are important considerations in balancing hate speech with competing *Charter* rights and in assessing the constitutionality of the prohibition in s. 14(1)(*b*) of the *Code*.

Framing speech as arising in a moral context or within a public policy debate does not cleanse it of its harmful effect. Finding that certain expression falls within political speech does not close off the enquiry into whether the expression constitutes hate speech. Hate speech may often arise as a part of a larger public discourse but it is speech of a restrictive and exclusionary kind. Political expression contributes to our democracy by encouraging the exchange of opposing views. Hate speech is antithetical to this objective in that it shuts down dialogue by making it difficult or impossible for members of the vulnerable group to respond, thereby stifling discourse. Speech that has the effect of shutting down public debate cannot dodge prohibition on the basis that it promotes debate. Section 14 of the *Code* provides an appropriate means by which to protect almost the entirety of political discourse as a vital part of freedom of expression. It extricates only an extreme and

marginal type of expression which contributes little to the values underlying freedom of expression and whose restriction is therefore easier to justify.

A prohibition is not overbroad for capturing expression targeting sexual behaviour. Courts have recognized a strong connection between sexual orientation and sexual conduct and where the conduct targeted by speech is a crucial aspect of the identity of a vulnerable group, attacks on this conduct stand as proxy for attacks on the group itself. If expression targeting certain sexual behaviour is framed in such a way as to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification, it cannot be said that such speech only targets the behaviour. It quite clearly targets the vulnerable group.

The fact that s. 14(1)(*b*) of the *Code* does not require intent by the publisher or proof of harm, or provide for any defences does not make it overbroad. Systemic discrimination is more widespread than intentional discrimination and the preventive measures found in human rights legislation reasonably centre on effects, rather than intent. The difficulty of establishing causality and the seriousness of the harm to vulnerable groups justifies the imposition of preventive measures that do not require proof of actual harm. The discriminatory effects of hate speech are part of the everyday knowledge and experience of Canadians. As such, the legislature is entitled to a reasonable apprehension of societal harm as a result of hate speech. The lack of defences is not fatal to the constitutionality of the provision. Truthful statements can be presented in a manner that would meet the definition of hate speech, and not all

truthful statements must be free from restriction. Allowing the dissemination of hate speech to be excused by a sincerely held belief would provide an absolute defence and would gut the prohibition of effectiveness.

The benefits of the suppression of hate speech and its harmful effects outweigh the detrimental effect of restricting expression which, by its nature, does little to promote the values underlying freedom of expression. Section 14(1)(*b*) of the *Code* represents a choice by the legislature to discourage hate speech in a manner that is conciliatory and remedial. The protection of vulnerable groups from the harmful effect emanating from hate speech is of such importance as to justify the minimal infringement of expression.

Section 14(1)(*b*) of the *Code* also infringes freedom of conscience and religion as guaranteed under s. 2(*a*) of the *Charter*. An infringement of s. 2(*a*) will be established where: (1) the claimant sincerely holds a belief or practice that has a nexus with religion; and (2) the provision at issue interferes with the claimant's ability to act in accordance with his or her religious beliefs. To the extent that an individual's choice of expression is caught by the definition of "hatred" in s. 14(1)(*b*), the prohibition will substantially interfere with that individual's ability to disseminate his or her belief by display or publication of those representations.

For the same reasons set out in the s. 1 analysis in the case of freedom of expression, the words "ridicules, belittles or otherwise affronts the dignity of" are not rationally connected to the legislative purpose of addressing systemic discrimination

of protected groups, nor tailored to minimally impair freedom of religion. The remaining prohibition of any representation "that exposes or tends to expose to hatred" any person or class of persons on the basis of a prohibited ground is a reasonable limit on freedom of religion and is demonstrably justified in a free and democratic society.

While the standard of review of the tribunal's decision on the constitutionality of s. 14 of the *Code* is correctness, the standard of review of the tribunal's decision that the flyers contravene that provision must be reasonableness. The tribunal did not unreasonably fail to give proper weight to the importance of protecting expression that is part of an ongoing debate on sexual morality and public policy. Nor was it unreasonable in isolating certain excerpts from the flyers for examination, or in finding that the flyers criticize sexual orientation and not simply sexual behaviour. That the rights of a vulnerable group are a matter of ongoing discussion does not justify greater exposure by that group to hatred and its effects. The only expression which should be caught by s. 14(1)(*b*) of the *Code* is hate-inspiring expression that adds little value to the political discourse or to the quest for truth, self-fulfillment, and an embracing marketplace of ideas. The words and phrases in a publication cannot properly be assessed out of context, and the expression must be considered as a whole, to determine the overall impact or effect of the publication. However, it is also legitimate to proceed with a closer scrutiny of those parts of the expression which draw nearer to the purview of s. 14(1)(*b*) of the *Code*. If, despite the context of the entire publication, even one phrase or sentence is

found to bring the publication, as a whole, in contravention of the *Code*, this precludes its publication in its current form.

The tribunal's conclusions with respect to the first two flyers were reasonable. Passages of these flyers combine many of the hallmarks of hatred identified in the case law. The expression portrays the targeted group as a menace that threatens the safety and well-being of others, makes reference to respected sources in an effort to lend credibility to the negative generalizations, and uses vilifying and derogatory representations to create a tone of hatred. The flyers also expressly call for discriminatory treatment of those of same-sex orientation. It was not unreasonable for the tribunal to conclude that this expression was more likely than not to expose homosexuals to hatred.

The tribunal's decision with respect to the other two flyers was unreasonable and cannot be upheld. The tribunal erred by failing to apply s. 14(1)(*b*) to the facts before it in accordance with the proper legal test. It cannot reasonably be found that those flyers contain expression that a reasonable person, aware of the relevant context and circumstances, would find as exposing or likely to expose persons of same-sex orientation to detestation and vilification. The expression, while offensive, does not demonstrate the hatred required by the prohibition.

Cases Cited

Referred to: *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Andrews*, [1990] 3 S.C.R. 870; *R. v. Krymowski*, 2005 SCC 7, [2005] 1 S.C.R. 101; *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892; *Human Rights Commission (Sask.) v. Bell* (1994), 120 Sask. R. 122; *Owens v. Human Rights Commission (Sask.)*, 2002 SKQB 506, 228 Sask. R. 148, rev'd 2006 SKCA 41, 267 D.L.R. (4th) 733; *Kane v. Alberta Report*, 2001 ABQB 570, 291 A.R. 71; *Elmasry v. Roger's Publishing Ltd. (No. 4)*, 2008 BCHRT 378, 64 C.H.R.R. D/509; *Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450; *Warman v. Kouba*, 2006 CHRT 50 (CanLII); *Citron v. Zündel (No. 4)* (2002), 41 C.H.R.R. D/274; *Warman v. Tremaine (No. 2)*, 2007 CHRT 2, 59 C.H.R.R. D/391; *Payzant v. McAleer* (1994), 26 C.H.R.R. D/271, aff'd (1996), 26 C.H.R.R. D/280; *Warman v. Northern Alliance*, 2009 CHRT 10 (CanLII); *Center for Research-Action on Race Relations v. www.bcwhitepride.com*, 2008 CHRT 1 (CanLII); *Warman v. Winnicki (No. 2)*, 2006 CHRT 20, 56 C.H.R.R. D/381; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R 100; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30,

[2007] 2 S.C.R. 610; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396; *Human Rights Commission (Sask.) v. Engineering Students' Society, University of Saskatchewan* (1989), 72 Sask. R. 161; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Abrams v. United States*, 250 U.S. 616 (1919); *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *R. v. Khawaja*, 2012 SCC 69; *Kempling v. College of Teachers (British Columbia)*, 2005 BCCA 327, 43 B.C.L.R. (4th) 41; *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Egan v. Canada*, [1995] 2 S.C.R. 513; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *R. v. Jones*, [1986] 2 S.C.R. 284; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2, 15.

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Criminal Code, R.S.C. 1985, c. C-46.

Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, ss. 2(1)(*m.01*)(vi), 3, 4, 5, 14, 31(4), 31.4(*a*), (*b*), 32(1).

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APPEAL from a judgment of the Saskatchewan Court of Appeal (Sherstobitoff, Smith and Hunter JJ.A.), 2010 SKCA 26, 346 Sask. R. 210, 477 W.A.C. 210, 317 D.L.R. (4th) 69, 218 C.R.R. (2d) 145, [2010] 4 W.W.R. 403, [2010] S.J. No. 108 (QL), 2010 CarswellSask 109, allowing an appeal from a decision of Kovach J., 2007 SKQB 450, 306 Sask. R. 186, 61 C.H.H.R. D/401, [2007] S.J. No. 672 (QL), 2007 CarswellSask 836, upholding a decision of the Saskatchewan

Human Rights Tribunal (2005), 52 C.H.R.R. D/264, 2005 CarswellSask 480. Appeal allowed in part.

Grant J. Scharfstein, Q.C., and *Deidre L. Aldcorn*, for the appellant.

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Mark A. Gelowitz and *Jason MacLean*, for the intervener the Canadian Constitution Foundation.

Andrew K. Lokan and *Jodi Martin*, for the intervener the Canadian Civil Liberties Association.

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Anthony D. Griffin, for the intervener the Ontario Human Rights Commission.

Mark J. Freiman, for the intervener the Canadian Jewish Congress.

Arif Chowdhury, for the interveners the Unitarian Congregation of Saskatoon and the Canadian Unitarian Council.

Kathleen E. Mahoney and *Jo-Ann R. Kolmes*, for the intervener the Women's Legal Education and Action Fund.

M. Philip Tunley and Paul J. Saguil, for the intervener the Canadian Journalists for Free Expression.

David Matas, for the intervener the Canadian Bar Association.

Written submissions only by Shaunt Parthev, Q.C., and *Ashley M. Smith*, for the interveners the Northwest Territories Human Rights Commission and the Yukon Human Rights Commission.

Derek J. Bell, Ranjan K. Agarwal and Ruth A. M. Ross, for the intervener the Christian Legal Fellowship.

Marvin Kurz, for the intervener the League for Human Rights of B'nai Brith Canada.

Donald E. L. Hutchinson and André Schutten, for the intervener the Evangelical Fellowship of Canada.

Ben Millard, for the intervener the United Church of Canada.

Written submissions only by David M. A. Stack, for the interveners the Assembly of First Nations, the Federation of Saskatchewan Indian Nations and the Métis Nation-Saskatchewan.

Ryan D. W. Dalziel and *Micah B. Rankin*, for the interveners the Catholic Civil Rights League and the Faith and Freedom Alliance.

Sunil Gurmukh, Moya Teklu and Ed Morgan, for the intervener the African Canadian Legal Clinic.

The judgment of the Court was delivered by

ROTHSTEIN J. —

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I. Introduction

[1] All rights guaranteed under the *Canadian Charter of Rights and Freedoms* are subject to reasonable limitations. This balancing of rights and limitations gives rise to a tension between freedom of expression constitutionally guaranteed under s. 2(*b*) of the *Charter* and legislative provisions prohibiting the promotion of hatred or the publication of hate speech. That tension has been considered by this Court in the context of the *Criminal Code*, R.S.C. 1985, c. C-46 (*R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Andrews*, [1990] 3 S.C.R. 870; and *R. v. Krymowski*, 2005 SCC 7, [2005] 1 S.C.R. 101) and in the context of human rights legislation (*Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892). It is in this latter context that the Court is asked to revisit the matter in the present appeal. We are also asked to decide whether the statutory prohibition at issue infringes freedom of religion as guaranteed by s. 2(*a*) of the *Charter*.

[2] The Saskatchewan legislature included a provision in its human rights legislation prohibiting hate publications. While emphasizing the importance of freedom of expression in a subsection of the provision, the intent of the statute is to suppress a certain type of expression which represents a potential cause of the discriminatory practices the human rights legislation seeks to eliminate. Our task is to determine whether the legislature's approach is constitutional.

[3] Four complaints were filed with the Saskatchewan Human Rights Commission (the "Commission") concerning four flyers published and distributed by

the respondent, William Whatcott. The flyers were distributed to the public and targeted homosexuals and were challenged by the complainants on the basis that they promoted hatred against individuals because of their sexual orientation. The Saskatchewan Human Rights Tribunal (the "Tribunal") held that the flyers constituted publications that contravened s. 14 of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 (the "*Code*") as they exposed persons to hatred and ridicule on the basis of their sexual orientation: (2005), 52 C.H.R.R. D/264. Section 14(1)(*b*) of the *Code* prohibits the publication or display of any representation "that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground". The *Code* lists "sexual orientation" as a prohibited ground (s. 2(1)(*m.01*)(vi)). All statutory provisions referred to in these reasons are reproduced in Appendix A.

[4] The Saskatchewan Court of Queen's Bench upheld the Tribunal's decision: 2007 SKQB 450, 306 Sask. R. 186. That decision was reversed by the Saskatchewan Court of Appeal: 2010 SKCA 26, 346 Sask. R. 210 ("*Whatcott* (*C.A.*)"). The appellate court accepted that s. 14(1)(*b*) was constitutional but held that the flyers at issue did not meet the test for hatred and were not prohibited publications within the meaning of s. 14(1)(*b*) of the *Code*.

[5] Two issues arise in this appeal. The first is whether s. 14(1)(*b*) of the *Code* is constitutional. If so, a second issue arises as to whether the Tribunal's application of that provision in the context of this case should have been upheld.

[6] I conclude that although s. 14(1)(*b*) of the *Code* infringes Mr. Whatcott's rights under both ss. 2(*a*) and 2(*b*) of the *Charter*, the infringement is justified under s. 1 of the *Charter*. This Court's approach in *Keegstra* and *Taylor*, with some modification, sets out an acceptable method for determining how to balance the competing rights and interests at play.

[7] In my respectful view, the Saskatchewan Court of Appeal erred, in part, in overturning the decision of the Tribunal. I would therefore allow the appeal and reinstate the decision of the Tribunal with respect to two of the flyers. I would dismiss the appeal in regard to the other two.

II. Facts

[8] In 2001 and 2002, Mr. Whatcott distributed four flyers in Regina and Saskatoon on behalf of the Christian Truth Activists. Two of the flyers, marked as exhibits D and E at the Tribunal hearing, were entitled "Keep Homosexuality out of Saskatoon's Public Schools!" ("Flyer D") and "Sodomites in our Public Schools" ("Flyer E"), respectively. The other two flyers, marked as exhibits F and G, were identical, and were a reprint of a page of classified advertisements to which handwritten comments were added ("Flyer F" and "Flyer G"). The flyers are reproduced in Appendix B.

[9] Four individuals, who received these flyers at their homes, filed complaints with the Commission. They alleged that the material promoted hatred

against individuals because of their sexual orientation, thereby violating s. 14 of the *Code*. The Commission appointed a human rights tribunal to hear the complaints.

[10] Relying on *Human Rights Commission (Sask.) v. Bell* (1994), 120 Sask. R. 122 (C.A.) ("*Bell*"), and on the Court of Queen's Bench decision in *Owens v. Human Rights Commission (Sask.)*, 2002 SKQB 506, 228 Sask. R. 148, rev'd 2006 SKCA 41, 267 D.L.R. (4th) 733, the Tribunal concluded that s. 14 of the *Code* was a reasonable restriction on Mr. Whatcott's rights to freedom of religion and expression as guaranteed by ss. 2(*a*) and (*b*) of the *Charter*. With respect to the issue of whether the materials distributed by Mr. Whatcott constituted a breach of s. 14 of the *Code*, the Tribunal isolated certain passages from each of the flyers and concluded that the material contained in each flyer could objectively be viewed as exposing homosexuals to hatred and ridicule.

[11] The Tribunal issued an order prohibiting Mr. Whatcott and the Christian Truth Activists from distributing the flyers or any similar materials promoting hatred against individuals because of their sexual orientation. It also ordered Mr. Whatcott to pay compensation in the amount of $2,500 to one complainant and $5,000 to each of the remaining three complainants.

III. Relevant Statutory Provisions

[12] At issue is s. 14 of the *Code*. It provides that :

> **14. –** (1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:
>
> (*a*) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a prohibited ground, of any right to which that person or class of persons is entitled under law; or
>
> (*b*) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.
>
> (2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.

IV. Judicial History

A. *Saskatchewan Court of Queen's Bench, 2007 SKQB 450, 306 Sask. R. 186*

[13] Kovach J. concluded that s. 14(1)(*b*) of the *Code* must be interpreted in accordance with the standard of hatred and contempt set out in *Taylor* so as to prohibit only "communication that involves extreme feelings and strong emotions of detestation, calumny and vilification" (para. 21). He upheld the Tribunal's conclusion that the flyers contravened the provision, largely on the basis that the flyers equated homosexuals with pedophiles and child abusers.

[14] With respect to the constitutionality of s. 14(1)(*b*), he held that while the provision may violate Mr. Whatcott's freedom of religion, the limit was justifiable.

B. *Saskatchewan Court of Appeal, 2010 SKCA 26, 346 Sask. R. 210*

[15] The Saskatchewan Court of Appeal issued concurring judgments by Smith and Hunter JJ.A., with Sherstobitoff J.A. concurring in both. Hunter J.A. reaffirmed that s. 14(1)(*b*) of the *Code* must be interpreted and applied so as to only prohibit communications involving extreme feelings and strong emotions of detestation, calumny and vilification. She cautioned that language used to debate the morality of an individual's behaviour must attract a relatively high degree of tolerance.

[16] Hunter J.A. found that the Tribunal and Court of Queen's Bench had failed to take the moral context of the flyers properly into account and had also failed to balance the limitation on freedom of expression in s. 14(1)(*b*) with the confirmation of the importance of expression set out in s. 14(2). In her view, the Tribunal and Kovach J. had erred in selecting specific phrases from the flyers, rather than dealing with the content and context of each flyer as a whole.

[17] She held that the words and phrases isolated by the Tribunal from Flyer D would not meet the definition of "hatred" set out in *Taylor* and that, in the context of a debate about the school curriculum, the entire flyer could not be considered a hate publication. She found that Flyer E was part of the ongoing debate about teaching

homosexuality in public schools, and that the comment "Sodomites are 430 times more likely to acquire Aids & 3 times more likely to sexually abuse children!" was merely hyperbole and did not taint the entire publication. Finally, she found that the ambiguity of the handwritten statements in Flyers F and G made it difficult to conclude from an objective perspective that the publication exposed homosexuals to hatred. She concluded that the flyers were not prohibited publications.

[18] Smith J.A. agreed that the flyers did not offend the prohibition at s. 14(1)(*b*) of the *Code* against hate publications. She found it significant that it was the activity (a type of sexual conduct) rather than the individuals (those of same-sex orientation) to which the flyers were directed. Questions of sexual morality, being linked to both public policy and individual autonomy, lay at the heart of protected speech. She concluded that "where, on an objective interpretation, the impugned expression is essentially directed to disapprobation of same-sex sexual conduct in a context of comment on issues of public policy or sexual morality, its limitation is not justifiable in a free and democratic society" (para. 138).

V. Issues

[19] The issues on appeal are whether s. 14(1)(*b*) of the *Code* infringes s. 2(*a*) and/or s. 2(*b*) of the *Charter* and, if so, whether the infringement is demonstrably justified under s. 1 of the *Charter*. If s. 14(1)(*b*) is found to survive the constitutional challenge, the issue will be whether the Tribunal's decision should have been upheld on appeal under s. 32(1) of the *Code*.

VI. The Definition of "Hatred"

[20] The Saskatchewan courts have consistently followed the approach to defining "hatred" set out in *Taylor* when interpreting and applying s. 14(1)(*b*) of the *Code*. Before embarking on a constitutional analysis of that provision, it will be useful to consider the *Taylor* definition of "hatred" and whether, in light of the criticisms of it, the definition should be rejected or modified.

A. *Summary of the Decision in Canada (Human Rights Commission) v. Taylor*

[21] *Taylor* was part of a trilogy of hate speech cases considered by this Court in 1990, along with *Keegstra* and *Andrews*. The main issue facing the Court in those cases was whether s. 13(1) of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33 ("*CHRA*"), violated freedom of expression guaranteed under s. 2(*b*) of the *Charter*, by restricting telephonic communications of matters likely to expose persons who are identifiable on the basis of a prohibited ground of discrimination, to *hatred or contempt*. The case arose from complaints regarding a telephone message service offering pre-recorded messages alleging, *inter alia*, a conspiracy by Jews to control Canadian society.

[22] Dickson C.J., writing for the majority, held that Mr. Taylor's freedom of expression was breached by s. 13(1) of the *CHRA*. However, the infringement was justified under s. 1.

[23] He found that s. 13(1) was a limitation "prescribed by law" (at p. 916) and that Parliament's objective behind s. 13(1) (preventing the harms caused by hate propaganda) was of pressing and substantial importance sufficient to justify some limitation on freedom of expression. Dickson C.J. also reiterated his comment in *Keegstra* (at p. 766) that, contextually, hate propaganda strays some distance from the spirit of s. 2(*b*) of the *Charter*, and reconfirmed that its suppression does not severely curtail the values underlying freedom of expression. He reasoned that, when conjoined with the remedial provisions of the *CHRA*, s. 13(1) operates to suppress hate propaganda and its harmful effects, and is thereby rationally connected to Parliament's objective. He rejected the argument that there could be no rational connection because it was questionable whether s. 13(1) actually reduces the incidence of hate propaganda. In Dickson C.J.'s view, the process of hearing a complaint and, if substantiated, issuing a cease and desist order, "reminds Canadians of our fundamental commitment to equality of opportunity and the eradication of racial and religious intolerance" (p. 924).

[24] In assessing whether s. 13(1) minimally impairs freedom of expression, Dickson C.J. rejected the submission that it was overbroad and excessively vague. In his view, there was no conflict between providing a meaningful interpretation of s. 13(1) and protecting freedom of expression "so long as the interpretation of the words 'hatred' and 'contempt' is fully informed by an awareness that Parliament's objective is to protect the equality and dignity of all individuals by reducing the incidence of harm-causing expression" (p. 927). Dickson C.J. concluded that s. 13(1)

"refers to unusually strong and deep-felt emotions of detestation, calumny and vilification" (p. 928 (emphasis added)). In his view, as long as tribunals required the ardent and extreme nature of feeling described by "hatred or contempt", there was "little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section" (p. 929).

[25] Finally, Dickson C.J. concluded that the effects of s. 13(1) on freedom of expression were not so deleterious as to make it an unacceptable abridgement of freedom of expression. The Court held that, although s. 13(1) infringed s. 2(*b*) of the *Charter*, it was justified under s. 1 as an infringement justifiable in a free and democratic society.

B. *Criticisms of the Taylor Definition of Hatred*

[26] The conclusion in *Taylor* about legislation similar to what is at issue in this case is not, however, determinative. Mr. Whatcott challenges the constitutionality of a different legislative provision, interpreted and applied over twenty years later, and in the context of a different prohibited ground.

[27] Mr. Whatcott and some interveners argue that there are a number of problems with the *Taylor* interpretation of "hatred" and with prohibiting hate speech generally. The criticisms tend to fall within two general categories, relating to either subjectivity or overbreadth. Criticisms concerning subjectivity are that the definition

1. leads to arbitrary and inconsistent results because it captures expression that an arbitrator or judge subjectively finds offensive or repugnant;

2. is a vague, emotive concept that is inherently subjective and unworkable; and

3. infringes freedom of expression in irrational ways not tied to the legislative objectives.

[28] Criticisms relating to overbreadth are that the definition or a particular legislative prohibition

1. is overreaching and captures more expression than is intended or necessary;

2. has a chilling effect on public debate, religious expression and media coverage of issues about moral conduct and social policy;

3. does not give legislative priority to freedom of expression;

4. restricts private communications;

5. should require intention;

6. should require proof of actual harm or discrimination; and

7. should provide for defences, such as a defence of truth.

[29] Some of these criticisms are directed to the manner in which a specific legislative prohibition is formulated. To the extent that they apply to s. 14(1)(*b*) of the *Code*, they will be addressed in the course of analyzing the constitutionality of that provision.

[30] However, I will first consider whether, in light of the criticisms, the definition of "hatred" established in *Taylor* remains valid, or should be modified or rejected.

C. *Subjectivity*

[31] In my view, the criticisms point to two conceptual challenges to achieving a consistent application of a prohibition against hate speech. One is how to deal with the inherent subjectivity of the concept of "hatred". Another is a mistaken propensity to focus on the ideas being expressed, rather than on the *effect* of the expression.

[32] Criticisms about the inherent subjectivity of "hatred" can be broken into two separate concerns. The first is that the prohibition will lead to arbitrary and inconsistent results, depending on the subjective views of judges and arbitrators. The second is that a prohibition predicated on "hatred" is too vague and inherently subjective to ever be applied objectively. The resulting uncertainty about its application will have a chilling effect on expression. I will deal with each of these concerns in turn.

(1) The Reasonable Person

[33] Subjectivity is not unique to the application of standards within human rights legislation. As long as human beings act in the role of judge or arbitrator, there will be a subjective element in the application of any standard or test to a given fact situation. In the words of Cardozo J.: ". . . the traditions of our jurisprudence commit us to the objective standard. I do not mean, of course, that this ideal of objective vision is ever perfectly attained" but rather, inescapably, that "[t]he perception of objective right takes the color of the subjective mind": B. N. Cardozo, *The Nature of the Judicial Process* (1921), at pp. 106 and 110.

[34] In response to this reality, courts develop legal principles for the purpose of providing a method of dealing with similar issues consistently. They follow precedent by looking to the manner in which a principle or standard was applied in comparable fact situations. Where the applicable standard or test is an objective one,

courts and tribunals apply it on the basis of how a reasonable person in the same position or circumstances would act or think.

[35] In the present context, the courts have confirmed that when applying a prohibition based on hatred, the outcome does not depend on the subjective views of the publisher or of the victim of the alleged hate publication, but rather on an objective application of the test: see *Owens*, at paras. 58-59; *Kane v. Alberta Report*, 2001 ABQB 570, 291 A.R. 71, at para. 125; *Elmasry v. Roger's Publishing Ltd. (No. 4)*, 2008 BCHRT 378, 64 C.H.R.R. D/509, at paras. 79-80; and *Whatcott* (*C.A.*), at para. 55. The courts pose the question of whether "when considered objectively by a reasonable person aware of the relevant context and circumstances, the speech in question would be understood as exposing or tending to expose members of the target group to hatred": *Owens*, at para. 60. In the course of this assessment, a judge or adjudicator is expected to put his or her personal views aside and to base the determination on what he or she perceives to be the rational views of an informed member of society, viewing the matter realistically and practically.

[36] Even Cardozo J., despite his acknowledgement of the inherent subjectivity involved in the judicial process, concedes that the objective ideal "is one to be striven for within the limits of our capacity" and warns that "[a] jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of degenerating into . . . a jurisprudence of mere sentiment or feeling" (p. 106). Although developing legal principles, following precedent and applying objective

standards will not completely eliminate subjectivity from the adjudicative process, these common law traditions reflect an awareness of the problem and provide a ground for appeal in cases of unjustifiable departure.

(2) Dealing with the Inherent Subjectivity of the Emotion of Hatred

[37] Nonetheless, is the emotion "hatred" too inherently subjective to be capable of an objective or consistent application? The argument, as I understand it, is that our perception and understanding of hatred, like any emotion, will depend in part on our different, personal experiences. Emotion is an "instinctive . . . feeling as distinguished from reasoning or knowledge" and is therefore subjective: *Oxford English Dictionary* (online). Therefore, a test predicated on a vague emotion makes subjective application inevitable.

[38] In *Taylor*, Dickson C.J. reasoned that the subjectivity and arbitrariness of a prohibition based on "hatred" could be reduced by giving full effect to the legislative intent. His reasoning suggests that this can be achieved in two ways: by adhering to the proper meaning of the words chosen by the legislature; and by applying the prohibition in a manner that is consistent with its legislative objectives. Because of the centrality of both the meaning of "hatred" and the legislative objectives, further elaboration will be useful.

(a) *The Meaning of "Hatred and Contempt"*

[39] In order to adhere to the legislative choice of the words "hatred and contempt", Dickson C.J. emphasized the importance of interpreting them in a manner that did not include emotions of lesser intensities. In his view, prohibitions of hate speech should not be triggered by lesser gradations of disapprobation, so as to capture offensive comments or expressions of dislike. Interpreting "hatred and contempt" to include feelings of dislike would expand their meaning beyond what was contemplated by the legislature and could capture expression which, while derogatory, does not cause the type of harm that human rights legislation seeks to eliminate. As long as a tribunal is aware of the purpose behind s. 13(1) of the *CHRA* and "pays heed to the ardent and extreme nature of feeling described in the phrase 'hatred and contempt'", Dickson C.J. reasoned that "there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section" (p. 929).

[40] Dickson C.J. analyzed the meaning of the words "hatred and contempt" as they are used in s. 13(1). He discussed with approval the approach of the human rights tribunal in *Nealy v. Johnston* (1989), 10 C.H.R.R. D/6450, at p. D/6469, which acknowledged that while those words "have a potentially emotive content" that could vary for each individual, there is "an important core of meaning in both" (*Taylor*, at p. 928). The tribunal found that "hatred" involves detestation, extreme ill-will and the failure to find any redeeming qualities in the target of the expression. "Contempt"

involves looking down on someone or treating them as inferior. Dickson C.J. found that, according to the tribunal, s. 13(1) refers to "unusually strong and deep-felt emotions of detestation, calumny and vilification" (*Taylor*, at p. 928). The legislative prohibition should therefore only apply to expression of an unusual and extreme nature.

[41] In my view, "detestation" and "vilification" aptly describe the harmful effect that the *Code* seeks to eliminate. Representations that expose a target group to detestation tend to inspire enmity and extreme ill-will against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to abuse, denigrate or delegitimize them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience. Expression exposing vulnerable groups to detestation and vilification goes far beyond merely discrediting, humiliating or offending the victims.

[42] On the other hand, the reference in the *Taylor* definition to calumny is unnecessary. "Calumny" is defined as a "[f]alse and malicious misrepresentation of the words or actions of others, calculated to injure their reputation; libellous detraction, slander": *Oxford English Dictionary* (online). While hate speech often uses the device of inflammatory falsehoods and misrepresentations to persuade and galvanize its audience, the use of such tools is not necessary to a finding that the expression exposes its targeted group to hatred. Nor would false misrepresentations, alone, be sufficient to constitute hate speech. In light of the general disuse of the

word "calumny" in everyday vocabulary, in my view its inclusion in the definition is unnecessary.

[43] Not all prohibitions of hate speech include the word "contempt", and s. 14(1)(*b*) of the *Code* does not. The tribunal in *Nealy v. Johnston* noted that the concept of "hatred" does not mandate a particular motive for the emotion, and that the word "contempt" added an element of looking down on or treating the object as inferior. While I agree with the tribunal that it is possible to hate someone one considers "superior", in my view the term "hatred" in the context of human rights legislation includes a component of looking down on or denying the worth of another. The act of vilifying a person or group connotes accusing them of disgusting characteristics, inherent deficiencies or immoral propensities which are too vile in nature to be shared by the person who vilifies. Even without the word "contempt" in the legislative prohibition, delegitimizing a group as unworthy, useless or inferior can be a component of exposing them to hatred. Such delegitimization reduces the target group's credibility, social standing and acceptance within society and is a key aspect of the social harm caused by hate speech.

[44] In the years following *Taylor*, there has been considerable human rights jurisprudence and academic commentary about what constitutes hate speech. The types of expression and devices used to expose groups to hatred were summarized as the "hallmarks of hate" enumerated in *Warman v. Kouba*, 2006 CHRT 50 (CanLII), at paras. 22 to 81. Hate speech often vilifies the targeted group by blaming its members

for the current problems in society, alleging that they are a "powerful menace" (para. 26); that they are carrying out secret conspiracies to gain global control (*Citron v. Zündel, (No. 4)* (2002), 41 C.H.R.R. D/274); or plotting to destroy western civilization (*Taylor*). Hate speech also further delegitimizes the targeted group by suggesting its members are illegal or unlawful, such as by labelling them "liars, cheats, criminals and thugs" (*Citron v. Zündel,* at para. 140); a "parasitic race" or "pure evil" (*Warman v. Tremaine (No. 2),* 2007 CHRT 2, 59 C.H.R.R. D/391, at para. 136).

[45] Exposure to hatred can also result from expression that equates the targeted group with groups traditionally reviled in society, such as child abusers, pedophiles (*Payzant v. McAleer* (1994), 26 C.H.R.R. D/271, aff'd (1996), 26 C.H.R.R. D/280 (F.C.T.D.), or "deviant criminals who prey on children" (*Warman v. Northern Alliance*, 2009 CHRT 10 (CanLII), at para. 43). One of the most extreme forms of vilification is to dehumanize a protected group by describing its members as animals or as sub-human. References to a group as "horrible creatures who ought not be allowed to live" (*Warman v. Northern Alliance*); "incognizant primates", "genetically inferior" and "lesser beasts" (*Center for Research-Action on Race Relations v. www.bcwhitepride.com*, 2008 CHRT 1 (CanLII), at para. 53); or "sub-human filth" (*Warman v. Winnicki (No. 2),* 2006 CHRT 20, 56 C.H.R.R. D/381, at para. 101) are examples of dehumanizing expression that calls into question whether group members qualify as human beings.

[46] As these examples illustrate, courts have been guided by the *Taylor* definition of hatred and have generally identified only extreme and egregious examples of delegitimizing expression as hate speech. This approach excludes merely offensive or hurtful expression from the ambit of the provision and respects the legislature's choice of a prohibition predicated on "hatred".

(b) *The Legislative Objectives*

[47] As to giving effect to the legislative objectives behind the prohibition, Dickson C.J. stated that there should be "no conflict between providing a meaningful interpretation of s. 13(1) and protecting the s. 2(*b*) freedom of expression" guaranteed by the *Charter*, provided that "the interpretation of the words 'hatred' and 'contempt' is fully informed by an awareness that Parliament's objective is to protect the equality and dignity of all individuals by reducing the incidence of harm-causing expression" (p. 927). Linking the test for hate speech to the specific legislative objectives is key to minimizing both subjectivity and overbreadth. Preventive measures should only prohibit the type of expression expected to cause the harm targeted. Since the decision in *Taylor*, courts have confirmed that the "harm" these legislative prohibitions seek to prevent is more than hurt feelings, humiliation or offensiveness: *Owens*, at paras. 52-53 and 58-60; and *Elmasry*, at paras. 79, 147 and 150.

[48] A prohibition of hate speech will not eliminate the emotion of hatred from the human experience. Employed in the context of human rights legislation, these prohibitions aim to eliminate the most extreme type of expression that has the

potential to incite or inspire discriminatory treatment against protected groups on the basis of a prohibited ground. In applying hate prohibitions, courts must assess whether the impugned expression is likely to expose a protected group to hatred and potentially lead to the activity that the legislature seeks to eliminate. This ties the analysis to the legislative purpose and works to prevent the prohibition from capturing more expressive activity than is necessary to achieve that objective.

D. *Focusing on the Effects of Hate Speech*

[49] A separate but related conceptual challenge that impedes the proper application of hate speech prohibitions is a mistaken propensity to focus on the nature of the ideas expressed, rather than on the likely effects of the expression. The repugnant content of expression may sidetrack litigants from the proper focus of the analysis.

[50] As explained in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 968, freedom of expression was guaranteed in the *Charter* "so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream". If the repugnancy or offensiveness of an idea does not exclude it from *Charter* protection under s. 2(*b*), they cannot, in themselves, be sufficient to justify a limitation on expression under a s. 1 analysis. A blanket prohibition on the communication of repugnant ideas would offend the core of freedom of expression and could not be viewed as a minimal impairment of that right.

[51] The distinction between the expression of repugnant ideas and expression which exposes groups to hatred is crucial to understanding the proper application of hate speech prohibitions. Hate speech legislation is not aimed at discouraging repugnant or offensive ideas. It does not, for example, prohibit expression which debates the merits of reducing the rights of vulnerable groups in society. It only restricts the use of expression exposing them to hatred as a part of that debate. It does not target the ideas, but their mode of expression in public and the effect that this mode of expression may have.

[52] An assessment of whether expression exposes a protected group to hatred must therefore include an evaluation of the likely effects of the expression on its audience. Would a reasonable person consider that the expression vilifying a protected group has the potential to lead to discrimination and other harmful effects? This assessment will depend largely on the context and circumstances of each case.

[53] For example, in the normal course of events, expression that targets a protected group in the context of satire, or news reports about hate speech perpetrated by someone else, would not likely constitute hate speech. Representations made in private settings would also not be captured by provisions prohibiting publication, display or broadcast of the expression, such as in s. 14(1)(*b*) of the *Code*. It may also make a difference whether the expression contains a singular remark that comes close to violating the prohibition, or contains a multitude of or repeated, delegitimizing attacks.

[54] Dickson C.J. emphasized this need to focus on *the effects* of the expression in his reasons in *Taylor*. He noted that "the purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate" (p. 933 (emphasis added)). The focus of the prohibition against hate propaganda in s. 13(1) of the *CHRA* is "solely upon [its] likely effects" (p. 931). Dickson C.J. reasoned that the preoccupation with the discriminatory effects was understandable, given that systemic discrimination is more widespread than intentional discrimination. Tribunals must focus on the likely effects of impugned expression in order to achieve the preventive goals of anti-discrimination statutes.

E. *Confirming a Modified Definition of "Hatred"*

[55] As will be apparent from the preceding discussion, in my view the *Taylor* definition of "hatred", with some modifications, provides a workable approach to interpreting the word "hatred" as it is used in prohibitions of hate speech. The guidance provided by *Taylor* should reduce the risk of subjective applications of such legislative restrictions, provided that three main prescriptions are followed.

[56] First, courts are directed to apply the hate speech prohibitions *objectively*. In my view, the reference in *Taylor* to "unusually strong and deep-felt emotions" (at p. 928) should not be interpreted as imposing a subjective test or limiting the analysis to the intensity with which the author of the expression feels the emotion. The question courts must ask is whether a reasonable person, aware of the context and

circumstances surrounding the expression, would view it as exposing the protected group to hatred.

[57] Second, the legislative term "hatred" or "hatred and contempt" is to be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.

[58] Third, tribunals must focus their analysis on the effect of the expression at issue. Is the expression likely to expose the targeted person or group to hatred by others? The repugnancy of the ideas being expressed is not, in itself, sufficient to justify restricting the expression. The prohibition of hate speech is not designed to censor ideas or to compel anyone to think "correctly". Similarly, it is irrelevant whether the author of the expression intended to incite hatred or discriminatory treatment or other harmful conduct towards the protected group. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination.

[59] In light of these three principles, where the term "hatred" is used in the context of a prohibition of expression in human rights legislation, it should be applied objectively to determine whether a reasonable person, aware of the context and

circumstances, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination.

[60] I turn now to the constitutionality of s. 14(1)(*b*) of the *Code*.

VII. Standard of Review in Constitutional Questions

[61] The standard of review on the constitutionality of s. 14(1)(*b*) of the *Code* is correctness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 58).

VIII. Constitutional Analysis

A. *Whether Section 14(1)(b) Infringes Freedom of Expression Under Section 2(b) of the Charter*

[62] Applying the framework most recently described by this Court in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19 ("*CBC*"), I agree with the concession by the Commission that the statutory prohibition against hate speech infringes the freedom of expression guaranteed under s. 2(*b*) of the *Charter*. The activity described in s. 14(1)(*b*) — the publication or display of certain types of expression — has expressive content and falls within the scope of s. 2(*b*) protection. The purpose of s. 14(1)(*b*) is to prevent discrimination by curtailing certain types of public expression.

B. *Section 1 — Whether the Infringement Is Demonstrably Justified in a Free and Democratic Society*

[63] Having found that the provision infringes s. 2(*b*) of the *Charter*, I turn to whether it may be saved under s. 1.

(1) The Approach to Freedom of Expression under Section 1

[64] Freedom of expression is central to our democracy. Nonetheless, this Court has consistently found that the right to freedom of expression is not absolute and limitations of freedom of expression may be justified under s. 1: see *Irwin Toy*; *Keegstra*; *Taylor*; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; and *CBC*. Section 1 both "guarantees and limits *Charter* rights and freedoms by reference to principles fundamental in a free and democratic society" (*Taylor*, at p. 916, *per* Dickson C.J.).

[65] The justification of a limit on freedom of expression under s. 1 requires a contextual and purposive approach. The values underlying freedom of expression will inform the context of the violation (see *Taylor*, *Keegstra* and *Sharpe*). McLachlin C.J., writing for the majority in *Sharpe*, explained succinctly the values underlying freedom of expression first recognized in *Irwin Toy*, being: "individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy" (para. 23).

[66] We are therefore required to balance the fundamental values underlying freedom of expression (and, later, freedom of religion) in the context in which they are invoked, with competing *Charter* rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings: s. 15 of the *Charter* and *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 78; and *Taylor,* at pp. 916 and 920.

[67] The balancing of competing *Charter* rights should also take into account Canada's international obligations with respect to international law treaty commitments (*Taylor,* at p. 916, *per* Dickson C.J.). Those commitments reflect an international recognition that certain types of expression may be limited in furtherance of other fundamental values (*Taylor,* at pp. 919 and 920, *per* Dickson C.J.).

[68] It is in the context of balancing these *Charter* rights that the Saskatchewan legislature has chosen to suppress expression of a certain kind. The prohibition set out under s. 14(1)(*b*) of the *Code* is clearly a "limit[ation] prescribed by law" within the meaning of s. 1 of the *Charter*. The issue is whether the infringement of s. 2(*b*) is demonstrably justified: *Oakes*; *CBC*, at para. 64.

(2) Is the Objective for Which the Limit Is Imposed Pressing and Substantial?

[69] Following the *Oakes* test, the first step is to determine whether the objective of s. 14(1)(*b*) advances concerns that are of sufficient importance to warrant overriding the constitutional guarantee of freedom of expression.

[70] The objective of s. 14(1)(*b*) may be ascertained directly from the *Code* in which it is found. Section 3 states that the objectives of the *Code* are:

> (*a*) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and
>
> (*b*) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

[71] Hate speech is, at its core, an effort to marginalize individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. When people are vilified as blameworthy or undeserving, it is easier to justify discriminatory treatment. The objective of s. 14(1)(*b*) may be understood as reducing the harmful effects and social costs of discrimination by tackling certain causes of discriminatory activity.

[72] The majority in *Keegstra* and *Taylor* reviewed evidence detailing the potential risks of harm from the dissemination of messages of hate, including the 1966 *Report of the Special Committee on Hate Propaganda in Canada*, commonly known as the Cohen Committee. The Cohen Committee wrote at a time when the

experiences of fascism in Italy and National Socialism in Germany were in recent memory. Almost fifty years later, I cannot say that those examples have proven to be isolated and unrepeated at our current point in history. One need only look to the former Yugoslavia, Cambodia, Rwanda, Darfur, or Uganda to see more recent examples of attempted cleansing or genocide on the basis of religion, ethnicity or sexual orientation. In terms of the effects of disseminating hateful messages, there is today the added impact of the Internet.

[73] In *Keegstra*, at p. 746-747, Dickson C.J. found that two types of harm were of a pressing and substantial concern. First, he referred to the grave psychological and social consequences to individual members of the targeted group from the humiliation and degradation caused by hate propaganda. Second, he noted the harmful effects on society at large by increasing discord and by affecting a subtle and unconscious altercation of views concerning the inferiority of the targeted group.

[74] Hate speech, therefore, rises beyond causing emotional distress to individual group members. It can have a societal impact. If a group of people are considered inferior, sub-human, or lawless, it is easier to justify denying the group and its members equal rights or status. As observed by this Court in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R 100, at para. 147, the findings in *Keegstra* suggest "that hate speech always denies fundamental rights". As the majority becomes desensitized by the effects of hate speech, the concern is that some members of society will demonstrate their rejection

of the vulnerable group through conduct. Hate speech lays the groundwork for later, broad attacks on vulnerable groups. These attacks can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide (see *Taylor* and *Keegstra*).

[75] Hate speech is not only used to justify restrictions or attacks on the rights of protected groups on prohibited grounds. As noted by Dickson C.J. at p. 763 of *Keegstra*, hate propaganda opposes the targeted group's ability to find self-fulfillment by articulating their thoughts and ideas. It impacts on that group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy. Indeed, a particularly insidious aspect of hate speech is that it acts to cut off any path of reply by the group under attack. It does this not only by attempting to marginalize the group so that their reply will be ignored: it also forces the group to argue for their basic humanity or social standing, as a precondition to participating in the deliberative aspects of our democracy.

[76] To use an example related to the present case, the suggestion that homosexual conduct should not be discussed in schools because homosexuals are pedophiles requires the protected group to first defeat the absolutist position that all homosexuals are pedophiles in order to justify a level of societal standing that would then permit participation in the larger debate of whether homosexual conduct should be discussed in schools. In this way, the expression inhibits the protected group from interacting and participating in free expression and public debate.

[77] This Court has recognized the harm caused by hate speech in a number of subsequent cases including *Ross*, *Sharpe*, and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877. I therefore have no difficulty in determining that the purpose of the legislation is pressing and substantial.

(3) Proportionality

[78] It is next necessary to consider whether s. 14(1)(*b*) of the *Code* is proportionate to its objective. Here perfection is not required. Rather the legislature's chosen approach must be accorded considerable deference. As McLachlin C.J. explained in *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 [2007] 2 S.C.R. 610 ("*JTI*"), at para. 41, "[e]ffective answers to complex social problems … may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable". We must ask whether Parliament has chosen one of several reasonable alternatives: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 781-83; *Irwin Toy*, at p. 989; *JTI*, at para. 43.

(a) *Is the Limit Rationally Connected to the Objective?*

(i) Societal Versus Individual Harm

[79] As determined with respect to s. 15(1) of the *Charter* in *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at paras. 35-36, the objective of eliminating discrimination and substantive inequality generally focuses on reducing the perpetuation of prejudice and disadvantage to members of a group on the basis of statutorily enumerated (or analogous) personal characteristics, or on the perpetuation of stereotyping that does not correspond to the actual circumstances and characteristics of the claimant group. When hate speech pertains to a vulnerable group, the concern is that it will perpetuate historical prejudice, disadvantage and stereotyping and result in social disharmony as well as harm to the rights of the vulnerable group.

[80] Therefore, the question of whether a restriction on hate speech is rationally connected to the legislative goal of reducing discrimination must focus on the group rather than on the individual and depends on demonstrating that the likely harm is to the group rather than an individual alone. Hate speech seeks to marginalize individuals based on their group characteristics. As such, in order to satisfy the rational connection requirement, the expression captured under legislation restricting hate speech must rise to a level beyond merely impugning individuals: it must seek to marginalize the group by affecting its social status and acceptance in the eyes of the majority.

[81] This is not to diminish the harm that might occur to individuals through attacks on their group. As Dickson C.J. noted in *Keegstra*, at p. 746, "[a] person's

sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs (see I. Berlin, 'Two Concepts of Liberty', in *Four Essays on Liberty* (1969), 118, at p. 155)." However, in the context of hate speech, this harm is derivative of the larger harm inflicted on the group, rather than purely individual.

[82] Societal harm flowing from hate speech must be assessed as objectively as possible. The feelings of the publisher or victim are not the test: *Owens*, at paras. 58-60. While the emotional damage from hate speech is indeed troubling, protecting the emotions of an individual group member is not rationally connected to the overall purpose of reducing discrimination. While it would certainly be expected that hate speech would prompt emotional reactions from members of the targeted group, in the context of hate speech legislation, these reactions are only relevant as a derivative effect of the attack on the group. As a derivative effect, these are not sufficient to justify an infringement of s. 2(*b*). Instead, the focus must be on the likely effect of the hate speech on how individuals external to the group might reconsider the social standing of the group. Ultimately, it is the need to protect the societal standing of vulnerable groups that is the objective of legislation restricting hate speech.

[83] Section 14(1)(*b*) of the *Code* reflects this approach. The prohibition only limits the display or publication of representations, such as through newspapers or other printed matter, or through television or radio broadcasting. In other words, it only prohibits *public* communications of hate speech. The Saskatchewan legislature

does not restrict hateful expression in private communications between individuals. While one would expect private expressions of hateful messages might inflict significant emotional harm, they do not impact the societal status of the protected group.

[84] Similarly, the prohibition does not preclude hate speech against an individual on the basis of his or her uniquely personal characteristics, but only on the basis of characteristics that are shared by others and have been legislatively recognized as a prohibited ground of discrimination. Although human rights legislation prohibits discrimination of both majority and minority subgroups identifiable by an enumerated characteristic, historical and jurisprudential experience demonstrates that hate speech is virtually always aimed at the minority subgroup. A prohibition of hate speech will only be rationally connected to the objective if its ambit is limited to expression publicly directed at a protected group, or at an individual on the basis that he or she is a member of that group.

(ii) Wording of Section 14(1)(*b*) of the *Code*

[85] The wording of s. 14(1)(*b*) of the *Code* has been criticized for prohibiting not only publications with representations exposing the target group to "hatred", but any representation which "ridicules, belittles or otherwise affronts the dignity of" any person or class of persons on the basis of a prohibited ground. The words "ridicules",

"belittles" or "affronts the dignity of" are said to lower the threshold of the test to capture "hurt feelings" and "affronts to dignity" that are not tied to the objective of eliminating discrimination. To the extent that they do, they are said to infringe freedom of expression in ways not rationally connected to the legislative objectives.

[86] In actual fact, the additional words in s. 14(1)(*b*) have not explicitly been used to lower its threshold below what was set in *Taylor*. Even before this Court's decision in *Taylor*, the Saskatchewan Court of Appeal narrowly applied the wording in s. 14(1)(*b*): *Human Rights Commission (Sask.) v. Engineering Students' Society, University of Saskatchewan* (1989), 72 Sask. R. 161; see also L. McNamara, "Negotiating the Contours of Unlawful Hate Speech: Regulation Under Provincial Human Rights Laws in Canada" (2005), 38 *U.B.C.L. Rev*. 1, at p. 57.

[87] Since the decision in *Taylor*, the Saskatchewan Court of Appeal has interpreted s. 14(1)(*b*) of the *Code*, including the words "ridicules, belittles or otherwise affronts the dignity of", to prohibit only those publications involving unusually strong and deep-felt emotions of detestation, calumny and vilification: see *Bell* at para. 31; *Owens*, at para. 53, and *Whatcott* (*C.A.*), at paras. 53-55.

[88] Although the expansive words "ridicules, belittles or otherwise affronts the dignity of" have essentially been ignored when applying s. 14(1)(*b*), it is a matter of concern to some interveners that "the legislation has never been amended, and no declaration has ever been made to read down the impugned law" (Christian Legal Fellowship factum, at para. 22), and that the express wording of the provision

contributes to its chilling effect (Canadian Journalists for Free Expression factum, at para. 5).

[89] In my view, expression that "ridicules, belittles or otherwise affronts the dignity of" does not rise to the level of ardent and extreme feelings that were found essential to the constitutionality of s. 13(1) of the *CHRA* in *Taylor*. Those words are not synonymous with "hatred" or "contempt". Rather, they refer to expression which is derogatory and insensitive, such as representations criticizing or making fun of protected groups on the basis of their commonly shared characteristics and practices, or on stereotypes. As Richards J.A. observed in *Owens*, at para. 53:

> Much speech which is self-evidently constitutionally protected involves some measure of ridicule, belittlement or an affront to dignity grounded in characteristics like race, religion and so forth. I have in mind, by way of general illustration, the editorial cartoon which satirizes people from a particular country, the magazine piece which criticizes the social policy agenda of a religious group and so forth. Freedom of speech in a healthy and robust democracy must make space for that kind of discourse. . . .

[90] I agree. Expression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However, for the reasons discussed above, offensive ideas are not sufficient to ground a justification for infringing on freedom of expression. While such expression may inspire feelings of distain or superiority, it does not expose the targeted group to hatred.

[91] There may be circumstances where expression that "ridicules" members of a protected group goes beyond humour or satire and risks exposing the person to detestation and vilification on the basis of a prohibited ground of discrimination. In such circumstances, however, the risk results from the intensity of the ridicule reaching a level where the target becomes exposed to hatred. While ridicule, taken to the extreme, can conceivably lead to exposure to hatred, in my view, "ridicule" in its ordinary sense would not typically have the potential to lead to the discrimination that the legislature seeks to address.

[92] Thus, in order to be rationally connected to the legislative objective of eliminating discrimination and the other societal harms of hate speech, s. 14(1)(*b*) must only prohibit expression that is likely to cause those effects through exposure to hatred. I find that the words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(*b*) are not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups. The manner in which they infringe freedom of expression cannot be justified under s. 1 of the *Charter* and, consequently, they are constitutionally invalid.

[93] It remains to determine whether the words "ridicules, belittles or otherwise affronts the dignity of" can be severed from s. 14(1)(*b*) of the *Code*, or whether their removal would transform the provision into something which was clearly outside the intention of the legislature. It is significant that in the course of oral argument before this Court, the Attorney General for Saskatchewan endorsed the

manner in which the words "ridicules, belittles or otherwise affronts the dignity of" were read out in *Bell*. I accept his view that the offending words can be severed without contravening the legislative intent.

[94] Given my determination that these words are unconstitutional, it is time to formally strike out those words from s. 14(1)(*b*) of the *Code*. The provision would therefore read:

> (*b*) that exposes or tends to expose to hatred any person or class of persons on the basis of a prohibited ground.

[95] Accordingly, I will proceed on the basis that the only word in issue on this appeal is "hatred". Interpreting that term in accordance with the modified *Taylor* definition of "hatred", the prohibition under s. 14(1)(*b*) of the *Code* is applied by inquiring whether, *in the view of a reasonable person aware of the context and circumstances, the representation exposes or tends to expose any person or class of persons to detestation and vilification on the basis of a prohibited ground of discrimination.*

(iii) Effectiveness

[96] Mr. Whatcott contends that s. 14(1)(*b*) is not rationally connected to its objective because its effect runs counter to that objective. While the legislative objective is to stop hate speech, he submits that the effect of the prohibition has been

to: (a) allow the Commission to discriminate against religious speech on sexual behaviour; (b) grant those found in contravention of s. 14(1)(*b*) an audience before which to promote their martyrdom; (c) increase hate crimes, as acknowledged by the Commission; and (d) increase hatred against Christian people due to their demonization by the Commission.

[97] As will be discussed more fully below, the extent to which s. 14(1)(*b*) has a discriminatory effect on religious speech by precluding certain types of expression is, in my view, minimal and reasonably justified. Freedom of religious speech and the freedom to teach or share religious beliefs are unlimited, except by the discrete and narrow requirement that this not be conveyed through hate speech.

[98] As to effectiveness, Dickson C.J. indicated, at pp. 923-924 of *Taylor*, that one should not be quick to assume that prohibitions against hate speech are ineffectual. In his view, the process of hearing a complaint and, if necessary, of issuing a cease and desist order, "reminds Canadians of our fundamental commitment to equality of opportunity" and the eradication of intolerance. The failure of the prohibition to render hate speech extinct or stop hate crimes is not fatal. As McLachlin C.J. noted for the majority in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, "[t]he government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so" (para. 48).

(iv) Conclusion in Respect of Rational Connection

[99] In my view, prohibiting representations that are objectively seen to expose protected groups to "hatred" is rationally connected to the objective of eliminating discrimination and the other harmful effects of hatred. Prohibiting expression which "ridicules, belittles or otherwise affronts the dignity of" protected groups is not rationally connected to reducing systematic discrimination against vulnerable groups. Those words unjustifiably infringe s. 2(*b*) of the *Charter* and are constitutionally invalid.

[100] Having severed the words "ridicules, belittles or otherwise affronts the dignity of" from s. 14(1)(*b*) of the *Code*, it remains to consider whether the balance of the prohibition can be demonstrably justified.

(b) *Minimal Impairment*

[101] The second test in the proportionality analysis is whether the limit minimally impairs the right. It is the role of the legislature to choose among competing policy options. There are often different ways to deal with a particular problem, and various parties argued before this Court that civil hate prohibitions should be rejected in favour of other methods, which I will briefly summarize. However, I am mindful that while it may "be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted" there is often "no certainty as to which will be the most effective": *JTI*, at para. 43, *per* McLachlin C.J. Provided the option chosen is one within a range of reasonably supportable alternatives, the minimal impairment test will be met: *Edwards Books*, at pp. 781-83.

(i) Alternative Methods of Furthering the Legislature's Objectives

[102] Two alternatives have been suggested that would better serve the goal of eradicating hate speech than the provisions of the *Code*. One is that trust should be placed in the "marketplace of ideas" to arrive at the appropriate balancing of competing rights and conflicting views. The other is that the prosecution of hate speech ought to be left to the criminal law.

[103] The notion of leaving the regulation of hate speech to the "marketplace of ideas" has long been advocated by critics of the regulation of hate speech (see *Abrams v. United States*, 250 U.S. 616 (1919), at p. 630, *per* Holmes J., dissenting; R. Dworkin, "Foreword" in I. Hare and J. Weinstein, eds., *Extreme Speech and Democracy* (2009); and R. Moon, *The Constitutional Protection of Freedom of Expression* (2000)). In the context of racial and religious discrimination, Dickson C.J. describes this approach as one that argues that "discriminatory ideas can best be met with information and education programmes extolling the merits of tolerance and cooperation between racial and religious groups" (see *Keegstra*, at p. 784). Under this theory, unfettered debate is the most effective way for rational beings to attain the truth, thus accomplishing one of the three purposes of freedom of expression.

[104] I do not say that the marketplace of ideas may not be a reasonable alternative, and where a legislature is so minded, it will not enact hate speech legislation. However, in *Keegstra*, Dickson C.J. set out a compelling rationale for why Parliament's preference to regulate hate speech through legislation rather than to

trust it to the hands of the marketplace was also reasonable. He noted that "the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas" (p. 763). In his view, paradoxically, hate speech undermines the principles upon which freedom of expression is based and "contributes little to the [. . .] quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged" (Dickson C.J., at p. 766 of *Keegstra*). That is because a common effect of hate speech is to discourage the contributions of the minority. While hate speech may achieve the self-fulfillment of the publisher, it does so by reducing the participation and self-fulfillment of individuals within the vulnerable group. These drawbacks suggest that this alternative is not without its concerns.

[105] Others suggest that to minimally impair expression, hate speech should be dealt with through criminal law prohibitions or other prohibitions restricting only speech which threatens, advocates or justifies violence: see R. Moon, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* (2008), at p. 26. Still, others suggest that when legislators seek to limit freedom of expression, the justificatory threshold should be raised to require actual evidence of harm as opposed to mere reasonable belief in the risk of harm: see L. W. Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (2004), at pp. 180-181, 202. On the other side, the Attorney General for Saskatchewan argues that the imposition of

remedial measures rather than punitive sanctions is far less intrusive on the constitutional values protected by s. 2, and therefore more acceptable under s. 1 of the *Charter* (factum, para. 58). The Commission argues that the *Criminal Code* provisions regulate only the most extreme forms of hate speech, advocating genocide or inciting a "breach of the peace". In contrast, human rights legislation "provides accessible and inexpensive access to justice" for disadvantaged victims to assert their right to dignity and equality: Commission factum, at para. 83. Aboriginal interveners say that only a civil remedy that is not dependent on state prosecution will provide an effective mechanism to address discriminatory speech. As noted by Sopinka J. in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, at p. 339, human rights legislation is "often the final refuge of the disadvantaged and the disenfranchised". Therefore, this alternative may reduce impairment at the cost of effectiveness.

[106] Having canvassed the proposed alternatives to the civil law remedy, I cannot say that any one represents such a superior approach as to render the others unreasonable. Section 14(1)(*b*) of the *Code* is within the range of reasonable alternatives that was available to the legislature.

(ii) Overbreadth

[107] Section 14(1)(*b*) is alleged to be overreaching, so that it captures more expression than is necessary to satisfy the legislative objectives, and thereby fails to minimally impair the right to freedom of expression. It is also criticized for having a

chilling effect on expression (including religious expression), public debate and media coverage on issues about moral conduct and social policy.

1. *Wording of Section 14 of the Code*

[108] Having concluded that the words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(*b*) are not rationally connected to the objective of prohibiting speech which can lead to discrimination, I also find them constitutionally invalid because they do not minimally impair freedom of expression.

[109] Restricting expression because it may offend or hurt feelings does not give sufficient weight to the role expression plays in individual self-fulfillment, the search for truth, and unfettered political discourse. Prohibiting any representation which "ridicules, belittles or affronts the dignity of" protected groups could capture a great deal of expression which, while offensive to most people, falls short of exposing its target group to the extreme detestation and vilification which risks provoking discriminatory activities against that group. Rather than being tailored to meet the particular requirements, such a broad prohibition would impair freedom of expression in a significant way.

[110] The Saskatchewan legislature recognized the importance of freedom of expression through its enactment of s. 14(2) of the *Code*. To repeat, that provision

confirms that "[n]othing in subsection (1) restricts the right to freedom of expression under the law upon any subject". The objective behind s. 14(1)(*b*) is not to censor ideas or to legislate morality. The legislative objective of the entire provision is to address harm from hate speech while limiting freedom of expression as little as possible.

[111] In my view, once the additional words are severed from s. 14(1)(*b*), the remaining prohibition is not overbroad. A limitation predicated on expression which exposes groups to hatred tries to distinguish between healthy and heated debate on controversial topics of political and social reform, and impassioned rhetoric which seeks to incite hatred as a means to effect reform. The boundary will not capture all harmful expression, but it is intended to capture expression which, by inspiring hatred, has the potential to cause the type of harm that the legislation is trying to prevent. In that way, the limitation is not overbroad, but rather tailored to impair freedom of expression as little as possible.

2. *Nature of the Expression*

[112] Violent expression and expression that threatens violence does not fall within the protected sphere of s. 2(*b*) of the *Charter*: *R. v. Khawaja*, 2012 SCC 69, at para. 70. However, apart from that, not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis. That is because different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will,

in turn, affect its value relative to other *Charter* rights, the exercise or protection of which may infringe freedom of expression.

[113] Dickson C.J. emphasized the special nature of hate propaganda at p. 766 of *Keegstra*, and again in *Taylor*, at p. 922:

> I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development, or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(*b*), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(*b*)" [*Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232], at p. 247).

[114] Hate speech is at some distance from the spirit of s. 2(*b*) because it does little to promote, and can in fact impede, the values underlying freedom of expression. As noted by Dickson C.J. in *Keegstra*, expression can be used to the detriment of the search for truth (p. 763). As earlier discussed, hate speech can also distort or limit the robust and free exchange of ideas by its tendency to silence the voice of its target group. It can achieve the self-fulfillment of the publisher, but often at the expense of that of the victim. These are important considerations in balancing hate speech with competing *Charter* rights and in assessing the constitutionality of the prohibition in s. 14(1)(*b*) of the *Code*.

3. *Political Discourse*

[115] While hate speech constitutes a type of expression that lies at the periphery of the values underlying freedom of expression, political expression lies close to the core of the guarantee: see *Sharpe*, at para. 23, *per* McLachlin C.J. Mr. Whatcott submits that the expression in his flyers relates to the discovery of truth and sexual politics, and is therefore at the core of protected expression. He submits that Flyers D and E are his commentary on a social policy debate about whether homosexuality should be discussed as part of the public school curriculum or at university conferences. The question here is how the prohibition in s. 14(1)(*b*) of the *Code* interplays with legitimate expression on matters of public policy or morality. If the restriction is overbroad, it will not minimally impair expression.

[116] The purpose of hate speech legislation is to restrict the use of representations likely to expose protected groups to hatred and its harmful effects. The expression captured under hate speech laws is of an extreme nature. Framing that speech as arising in a "moral" context or "within a public policy debate" does not cleanse it of its harmful effect. Indeed, if one understands an effect of hate speech as curtailing the ability of the affected group to participate in the debate, relaxing the standard in the context of political debate is arguably more rather than less damaging to freedom of expression. As argued by some interveners, history demonstrates that

some of the most damaging hate rhetoric can be characterized as "moral", "political" or "public policy" discourse.

[117] Finding that certain expression falls within political speech does not close off an enquiry into whether the expression constitutes hate speech. Hate speech may often arise as a part of a larger public discourse but, as discussed in *Keegstra* and *Taylor*, it is speech of a restrictive and exclusionary kind. Political expression contributes to our democracy by encouraging the exchange of opposing views. Hate speech is antithetical to this objective in that it shuts down dialogue by making it difficult or impossible for members of the vulnerable group to respond, thereby stifling discourse. Speech that has the effect of shutting down public debate cannot dodge prohibition on the basis that it promotes debate.

[118] For example, in *Kempling v. College of Teachers (British Columbia)*, 2005 BCCA 327, 43 B.C.L.R. (4th) 41, Lowry J.A. acknowledged that Mr. Kempling's published writings included a legitimate political element, as portions formed "a reasoned discourse, espousing his views as to detrimental aspects of homosexual relationships" (para. 76). Lowry J.A. reasoned that although Mr. Kempling's views may be unpopular, "he was, in his more restrained writings, engaged in a rational debate of political and social issues; such writing is near the core of the s. 2(b) expression" (para.76). However, Lowry J.A. found that at times the writings "clearly crossed the line of reasoned debate into discriminatory rhetoric" (para.76), and judged homosexuals on the basis of stereotypical notions. As a result,

he found that the writings, taken as a whole, were not deserving of a high level of constitutional protection.

[119] The polemicist may still participate on controversial topics that may be characterized as "moral" or "political". However, words matter. In the context of this case, Mr. Whatcott can express disapproval of homosexual conduct and advocate that it should not be discussed in public schools or at university conferences. Section 14(1)(*b*) only prohibits his use of hate-inspiring representations against homosexuals in the course of expressing those views. As stated by Alito J. in dissent in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), at p. 1227:

> I fail to see why actionable speech should be immunized simply because it is interspersed with speech that is protected.

[120] In my view, s. 14 of the *Code* provides an appropriate means by which to protect almost the entirety of political discourse as a vital part of freedom of expression. It extricates only an extreme and marginal type of expression which contributes little to the values underlying freedom of expression and whose restriction is therefore easier to justify (see *Keegstra* at p. 761; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at p. 247). This suggests that, at least in this respect, the provision is not overbroad in its application.

4. *Sexual Orientation versus Sexual Behaviour*

[121] Mr. Whatcott argues that the publications at issue in this case were critical of same-sex behaviour, as distinct from sexual orientation, and therefore did not contravene s. 14(1)(*b*) of the *Code*. If s. 14(1)(*b*) restricts criticisms of the behaviour of others, it is overbroad and unconstitutional. Mr. Whatcott also submits that comment on the sexual behaviour of others has always been allowed as part of free speech, and part of freedom of conscience and religion. He argues that the law must allow diversity of viewpoints on whether sexual matters are moral or immoral.

[122] I agree that sexual orientation and sexual behaviour can be differentiated for certain purposes. However, in instances where hate speech is directed toward behaviour in an effort to mask the true target, the vulnerable group, this distinction should not serve to avoid s. 14(1)(*b*). One such instance is where the expression does not denigrate certain sexual conduct in and of itself, but only when it is carried out by same-sex partners. Another is when hate speech is directed at behaviour that is integral to and inseparable from the identity of the group.

[123] L'Heureux-Dubé J. in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, in dissent (though not on this point), emphasized this linkage, at para. 69:

> I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. … The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as *per* Madam Justice Rowles: "Human rights law states

> that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person" (para. 228). She added that "the kind of tolerance that is required [by equality] is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people" (para. 230). This is not to suggest that engaging in homosexual behaviour automatically defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.

See also *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 175 and *Owens*, at para. 82.

[124] Courts have thus recognized that there is a strong connection between sexual orientation and sexual conduct. Where the conduct that is the target of speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself. If expression targeting certain sexual behaviour is framed in such a way as to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification, it cannot be said that such speech only targets the behaviour. It quite clearly targets the vulnerable group. Therefore, a prohibition is not overbroad for capturing expression of this nature.

(iii) Intent, Proof, and Defences

[125] Critics of s. 14(1)(*b*) of the *Code* claim that it is also overbroad because: i) it does not require intent by the publisher; ii) it does not require proof of harm; and iii) it does not provide for any defences.

1. *Intent*

[126] In *Taylor*, Dickson C.J. justified the lack of a legislative requirement to prove intent by emphasizing that systemic discrimination is more widespread than intentional discrimination and that the focus of the legislation should be on effects and not intent (pp. 931-32):

> The preoccupation with effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of anti-discrimination statutes. At the same time, however, it cannot be denied that to ignore intent in determining whether a discriminatory practice has taken place according to s. 13(1) increases the degree of restriction upon the constitutionally protected freedom of expression. This result flows from the realization that an individual open to condemnation and censure because his or her words may have an unintended effect will be more likely to exercise caution via self-censorship. [Emphasis in original.]

[127] The preventive measures found in human rights legislation reasonably centre on effects, rather than intent. I see no reason to depart from this approach.

2. *Proof of Harm*

[128] I have already addressed the notion of harm in the context of whether the objective of s. 14(1)(*b*) is pressing and substantial.

[129] In answer to the specific criticism that a prohibition against hate speech lacked a requirement to prove actual harm, Dickson C.J. argued in *Keegstra* (at p. 776) that both the difficulty of establishing a causal link between an expressive statement and the resulting hatred, and the seriousness of the harm to which vulnerable groups are exposed by hate speech, justifies the imposition of preventive measures that do not require proof of actual harm.

[130] Critics argue that the deference to the legislature shown by this Court in *Keegstra*, *Taylor*, *Butler* and *Sharpe* is an abdication of its duty to require that limitations on *Charter* rights be "demonstrably justified" under the s. 1 analysis: Sumner, at pp. 83 and 202-3. The Court's "deferential approach under section 1 to state restrictions on expression", has been said to erode the constitutional protection for freedom of expression: see R. Moon (2000), at p. 37. The basic nature of the criticism is that it is an unacceptable impairment of freedom of expression to allow its restriction to be justified by the mere likelihood or risk of harm, rather than a clear causal link between hate speech and harmful or discriminatory acts against the vulnerable group.

[131] Such an approach, however, ignores the particularly insidious nature of hate speech. The end goal of hate speech is to shift the environment from one where harm against vulnerable groups is not tolerated to one where hate speech has created a place where this is either accepted or a blind eye is turned.

[132] This Court has addressed such criticism in a number of situations involving the applicability of s. 1 and has adopted a "reasonable apprehension of harm" approach. This approach recognizes that a precise causal link for certain societal harms ought not to be required. A court is entitled to use common sense and experience in recognizing that certain activities, hate speech among them, inflict societal harms.

[133] In *Thomson Newspapers Co.*, this Court recognized that a reasonable apprehension of harm test should be applied in cases where "it has been suggested, though not proven, that the very nature of the expression in question undermines the position of groups or individuals as equal participants in society" (para. 115). Such an approach is warranted "when it is difficult or impossible to establish scientifically the type of harm in question" (para. 115). As the Court reasoned, at para. 116:

> While courts should not use common sense as a cover for unfounded or controversial assumptions, it may be appropriately employed in judicial reasoning where the possibility of harm is within the everyday knowledge and experience of Canadians, or where factual determination and value judgments overlap. Canadians presume that expressions which degrade individuals based on their gender, ethnicity, or other personal factors may lead to harm being visited upon them because this is within most people's everyday experience . . . Common sense reflects common understandings. In these cases dealing with pornography and hate speech, common understandings were accepted by the Court because they are widely accepted by Canadians as facts, and because they are integrally related to our values, which are the bedrock of any s. 1 justification. As a result, the Court did not demand a scientific demonstration or the submission of definitive social science evidence to establish that the line drawn by Parliament was perfectly drawn.

[134] In *Irwin Toy*, this Court noted that the government was "afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence" (p. 990). In her dissent in *Keegstra*, McLachlin J. acknowledged that "it is simply not possible to assess with any precision the effects that expression of a particular message will have on all those who are ultimately exposed to it" (p. 857). In *Butler*, Sopinka J., for the majority, agreed with the view that Parliament should be "entitled to have a 'reasoned apprehension of harm' resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations" (p. 504) and noted that "[W]hile a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs" (p. 502). Again in *Sharpe*, McLachlin C.J., writing for the majority, applied the reasonable apprehension of harm test and stated, at para. 89:

> The lack of unanimity in scientific opinion is not fatal. Complex human behaviour may not lend itself to precise scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of.

[135] As was clear from *Taylor*, and reaffirmed through the evidence submitted by interveners in this appeal, the discriminatory effects of hate speech are part of the everyday knowledge and experience of Canadians. I am of the opinion that the Saskatchewan legislature is entitled to a reasonable apprehension of societal harm as a result of hate speech.

3. *Lack of Defences*

[136] In the context of civil liability for contravening a limitation on a certain type of expression such as defamation, the types of defences that are generally raised relate to the truth of the factual statements made. The legislature of Saskatchewan has not provided a defence of truth or any other defence as a basis upon which to avoid being found in contravention of s. 14(1)(*b*) of the *Code* (other than that private communications are not included in the prohibition).

[137] The majority in *Taylor* held that the lack of defences was not fatal to finding s. 13(1) of the *CHRA* constitutional. Dickson C.J. was of the view that the *Charter* did not mandate an exception for truthful statements in the context of human rights legislation (p. 935). He drew upon his reasoning in *Keegstra* on this point, where he stated, at p. 781:

> The way in which I have defined the s. 319(2) offence, in the context of the objective sought by society and the value of the prohibited expression, gives me some doubt as to whether the *Charter* mandates that truthful statements communicated with an intention to promote hatred need be excepted from criminal condemnation. Truth may be used for widely disparate ends, and I find it difficult to accept that circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a racial or religious group. It would seem to follow that there is no reason why the individual who intentionally employs such statements to achieve harmful ends must under the *Charter* be protected from criminal censure. [Emphasis in original.]

[138] Although Dickson C.J. refers to intentionally employing truthful statements in the criminal context of *Keegstra*, he reconfirmed in *Taylor* that the use of truthful statements should not provide a shield in the human rights context (p. 935-36). Nor did he consider that a failure to provide a defence for negligent or innocent error would lead to the provision being held an excessive impairment of freedom of expression (*Keegstra*, at p. 782).

[139] Critics find the absence of a defence of truth of particular concern, given that seeking truth is one of the strongest justifications for freedom of expression. They argue that the right to speak the truth should not be lightly restricted, and that any restriction should be seen as a serious infringement.

[140] I agree with the argument that the quest for truth is an essential component of the "marketplace of ideas" which is, itself, central to a strong democracy. The search for truth is also an important part of self-fulfillment. However, I do not think it is inconsistent with these views to find that not all truthful statements must be free from restriction. Truthful statements can be interlaced with harmful ones or otherwise presented in a manner that would meet the definition of hate speech.

[141] As Dickson C.J. stated in *Keegstra*, at p. 763, there is "very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world". To the extent that truthful statements are used in a manner or context that exposes a vulnerable group to hatred,

their use risks the same potential harmful effects on the vulnerable groups that false statements can provoke. The vulnerable group is no less worthy of protection because the publisher has succeeded in turning true statements into a hateful message. In not providing for a defence of truth, the legislature has said that even truthful statements may be expressed in language or context that exposes a vulnerable group to hatred.

[142] Some interveners argued that there should be a defence of sincerely held belief. In their view, speech that is made in good faith and on the basis of the speaker's religious beliefs should be given greater protection, or constitute an absolute defence to any prohibition. These arguments anticipate the question still to be considered of whether an infringement of s. 2(*a*) of the *Charter* by s. 14(1)(*b*) would be justified under a s. 1 analysis. It is sufficient here to say that if the sincerity of a religious belief would automatically preclude the finding of a contravention of s. 14(1)(*b*), the s. 1 analysis would be derailed with no balancing of the competing rights.

[143] Apart from that concern, the fact that a person circulates a hate publication in the furtherance of a sincere religious belief goes to the question of the subjective view of the publisher, which is irrelevant to the objective application of the definition of hatred. Allowing the dissemination of hate speech to be excused by a sincerely held belief would, in effect, provide an absolute defence and would gut the prohibition of effectiveness.

[144] Mr. Whatcott makes the argument that human rights commissions should not over-analyze speech to the point "where less sophisticated citizens are unable to participate in debates about morality and public education without fear of prosecution" (factum, at para. 57). He submits that freedom of expression "does not restrict public debate to articulate elites" (para. 58). With respect, the definition does not require that the expression be scholarly, rational, objective or inoffensive. The definition of "hatred" does not differentiate between the literate and illiterate, eloquent or inarticulate. Whether or not a publisher of hateful expression is sincere in his or her beliefs, or lacks the sophistication to realize that prohibitions such as s. 14(1)(*b*) of the *Code* exist, the aim of the prohibition remains the protection of vulnerable groups. Where, objectively, the definition of hatred is met, s. 14(1)(*b*) is engaged. However, with mediation available, it should be possible for inadvertent violations to be rectified so that publications that do not include hate speech can continue.

(iv) Conclusion on Minimal Impairment

[145] The prohibition against hate speech involves balancing between freedom of expression and equality rights. People are free to debate or speak out against the rights or characteristics of vulnerable groups, but not in a manner which is objectively seen to expose them to hatred and its harmful effects. The only expression that should be suppressed by the prohibition is that which Dickson C.J. recognized in

Keegstra as straying "some distance from the spirit of s. 2(*b*) [of the *Charter*]" (p. 766).

[146] In my view, s. 14(1)(*b*) of the *Code* meets the minimal impairment requirement. The prohibition, interpreted and applied in the manner set out in these reasons, is one of the reasonable alternatives that could have been selected by the legislature. It impairs freedom of expression "no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account" (*Sharpe*, at para. 96, *per* McLachlin C.J. (emphasis in original)).

(c) *Whether the Benefits Outweigh the Deleterious Effects*

[147] The final branch of the proportionality test requires an assessment of whether the importance of the legislative objective of s. 14(1)(*b*) of the *Code* outweighs the deleterious effects of the provision in limiting freedom of expression. If the deleterious effects of the restriction outweigh the benefits to be derived from the provision, that part of the proportionality test is not met.

[148] As is apparent from the above analysis, in my opinion, the benefits of the suppression of hate speech and its harmful effects outweigh the detrimental effect of restricting expression which, by its nature, does little to promote the values underlying freedom of expression. Section 14(1)(*b*) of the *Code* represents a choice by the legislature to discourage hate speech and its harmful effects on both the vulnerable group and on society as a whole, in a manner that is conciliatory and

remedial. In cases such as the present, the process under the legislation can provide guidance to individuals like Mr. Whatcott, so that they can continue expressing their views in a way that avoids falling within the narrow scope of expression captured by the statutory prohibition. The protection of vulnerable groups from the harmful effects emanating from hate speech is of such importance as to justify the minimal infringement of expression that results from the restriction of materials of this kind.

[149] It was argued before this Court that the imposition of fines or the requirement to pay compensation to the victims of hate speech has a detrimental, chilling effect on expression that outweighs the benefits of reducing "potential harm". As in tort law, an award of damages made pursuant to the *Code* is characterized as compensatory, not punitive, and is directed at compensating the victim. However, the circumstances in which a compensation award will be merited should be rare and will often involve repeat litigants who refuse to participate in a conciliatory approach.

[150] The Attorney General for Saskatchewan pointed out amendments that were made to the *Code* in 2000 (S.S. 2000, c. 26) to strengthen its civil nature. Those amendments eliminated any possibility for imprisonment for a breach of the *Code*, strengthened the mediation and settlement aspects of the *Code* and gave the Chief Commissioner the duty to screen cases before they proceed. Contravening a substantive provision of the *Code* is no longer an offence, and will not result in the imposition of any fines, unless imposed for contempt of an order. Amendments brought since the tribunal hearing in this case (S.S. 2011, c. 17) again strengthen the

mediation option and screening of cases, and provide that new complaints will be heard by the Court of Queen's Bench, rather than the Tribunal. These amendments render unpersuasive the argument that paying fines and compensation are an effect that outweighs the benefits of s. 14(1)(*b*).

(d) *Conclusion on Section 1 Analysis*

[151] The limitation imposed on freedom of expression by the prohibition in s. 14(1)(*b*) of the *Code*, when properly defined and understood, is demonstrably justified in a free and democratic society.

C. *Section 2(a) of the Charter*

[152] I now turn to a consideration of whether s. 14(1)(*b*) infringes the *Charter* guarantee of freedom of conscience and religion under s. 2(*a*). Mr. Whatcott argues that, to the extent that s. 14(1)(*b*) of the *Code* precludes criticism of same-sex conduct or activity, it infringes freedom of religion under s. 2(*a*). He submits that sexual conduct has long been a topic of religious discussion and debate, and that "[o]bjection to same-sex sexual activity is common among religious people. They object because they believe this conduct is harmful; and many religious people also believe that they are obligated to do good and warn others of the danger" (factum, at para. 78). Mr. Whatcott contends that s. 2(*a*) protects his right to proclaim this aspect of his religion.

[153] The Commission argues that the publication of hateful religious beliefs of the type that would meet the *Taylor* definition is harmful, and would therefore be outside the scope of guarantee under s. 2(*a*) of the *Charter*. In support of its position of narrowing the scope of s. 2(*a*) protection, it relies in part on the reasoning of Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, where he stated, at p. 346:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. [Emphasis added by the Commission; factum, at para. 99.]

The Commission also relies on the comments of LeBel J. in *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 149, that this Court "has not ruled out the possibility of reconciling or delimiting rights before applying s. 1".

[154] With respect to the Commission's position, in my view, the present case falls within the general rule, rather than the exception. Just as the protection afforded by freedom of expression is extended to all expression other than violence and threats of violence, in my view, the protection provided under s. 2(*a*) should extend broadly. As stated by La Forest J., writing also on behalf of Gonthier and McLachlin JJ. in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 109, "[t]his Court has consistently refrained from formulating internal limits to the

scope of freedom of religion in cases where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under s. 1 of the *Charter*": *R. v. Jones*, [1986] 2 S.C.R. 284. Given the engagement of freedom of expression, freedom of religion and equality rights in the present context, a s. 1 analysis is the appropriate procedural approach under which to evaluate their constitutional interplay.

[155] An infringement of s. 2(*a*) of the *Charter* will be established where: (1) the claimant sincerely holds a belief or practice that has a nexus with religion; and (2) the provision at issue interferes with the claimant's ability to act in accordance with his or her religious beliefs: *Alberta v. Hutterian Brethren of Wilson Colony*, at para. 32; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 46 and paras. 56-59; and *Multani*, at para. 34. The interference must be more than trivial or insubstantial, so that it threatens actual religious beliefs or conduct.

[156] It was not in dispute that Mr. Whatcott sincerely believes that his religion requires him to proselytize homosexuals. To this end, he appears to employ expression of an extreme and graphic nature to make his point more compelling. To the extent that his choice of expression is caught by the hatred definition in s. 14(1)(*b*), the prohibition will substantially interfere with Mr. Whatcott's ability to disseminate his belief by display or publication of those representations. Section 14(1)(*b*) of the *Code* infringes freedom of conscience and religion as guaranteed under s. 2(*a*) of the *Charter*.

[157] However, concluding that alleged hate speech can be protected under s. 2(*a*) of the *Charter* and that s. 14(1)(*b*) of the *Code* infringes s. 2(*a*), does not end the matter. A section 1 analysis must be undertaken to determine whether the infringement of freedom of religion in this context is reasonably justified in a free and democratic society.

D. *Section 1 Analysis*

[158] The section 1 analysis with respect to the infringement of s. 2(*a*) of the *Charter* by s. 14(1)(*b*) of the *Code* raises similar considerations to that carried out in the context of s. 2(*b*).

[159] Preaching and the dissemination of religious beliefs is an important aspect of some religions. As stated by Dickson J. in *Big M Drug Mart*, at p. 336, "[t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" (emphasis added). Section 4 of the *Code* confirms that every person enjoys the right to "freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship".

[160] Mr. Whatcott asserts that the prohibition of speech of the type contained in his flyers will force people like himself to choose between following their

conscience by preaching about same-sex sexual practices or following the law. The Christian Legal Fellowship argues that punishing Mr. Whatcott for this speech "limits the free expression of every religious adherent whose beliefs on sexuality or other controversial topics do not conform to those of mainstream society and allows those with minority views to be silenced through the operation of law" (factum, at para. 12).

[161] As discussed in the s. 1 analysis of the infringement of freedom of expression by s. 14(1)(*b*) of the *Code*, s. 1 both guarantees and limits *Charter* rights. When reconciling *Charter* rights and values, freedom of religion and the right to equality accorded all residents of Saskatchewan must co-exist.

[162] In *Ross*, La Forest J. recognized that there could be circumstances in which the infringement of an exercise of freedom of religion, like that of freedom of expression, could merit only an attenuated level of s. 1 justification. La Forest J. noted that the respondent's religious views in that case sought to deny Jews respect for dignity and equality. He went on to state, at para. 94, that "[w]here the manifestations of an individual's right or freedom are incompatible with the very values sought to be upheld in the process of undertaking a s. 1 analysis, then, an attenuated level of s. 1 justification is appropriate".

[163] For the purposes of the application of s. 14(1)(*b*) of the *Code*, it does not matter whether the expression at issue is religiously motivated or not. If, viewed objectively, the publication involves representations that expose or are likely to expose

the vulnerable group to detestation and vilification, then the religious expression is captured by the legislative prohibition. In other words, Mr. Whatcott and others are free to preach against same-sex activities, to urge its censorship from the public school curriculum and to seek to convert others to their point of view. Their freedom to express those views is unlimited, except by the narrow requirement that they not be conveyed through hate speech.

[164] For the same reasons set out earlier in the s. 1 analysis in the case of freedom of expression, in my view, the words "ridicules, belittles or otherwise affronts the dignity of" are not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups, nor tailored to minimally impair freedom of religion. I find the remaining prohibition of any representation "that exposes or tends to expose to hatred" any person or class of persons on the basis of a prohibited ground to be a reasonable limit on freedom of religion and demonstrably justified in a free and democratic society.

IX. Application of Section 14(1)(*b*) to Mr. Whatcott's Flyers

[165] After this lengthy discussion of the interpretation of the definition of "hatred" and the constitutionality of s. 14(1)(*b*) of the *Code*, I turn to whether the Tribunal's decision that Mr. Whatcott's flyers contravene s. 14(1)(*b*) should be upheld on appeal.

A. *Standard of Review of Tribunal Decision*

[166] The Court of Queen's Bench and the Court of Appeal both adopted a correctness standard in this case, based on the reasoning of Richards J.A. in *Owens*. Richards J.A. had concluded that a standard of correctness was appropriate, given the absence of a statutory privative clause, the lack of any special expertise by the tribunal in human rights issues, the fact that the findings in the case had been arrived at through a formal adjudicative process, and that the issue raised turned on important points of law, including the interpretation of the Constitution.

[167] The decision in *Owens* predates this Court's decision in *Dunsmuir*, which now governs the standard of review. *Dunsmuir* confirmed that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (at para. 54; see also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, the Court summarized the *Dunsmuir* approach, at para. 30:

> This principle [of deference] applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, . . . [q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals [and] true questions of jurisdiction or *vires*" (*Canada (Human Rights Commission) v. Canada* (*Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ.).

[168] In this case, the decision was well within the expertise of the Tribunal, interpreting its home statute and applying it to the facts before it. The decision followed the *Taylor* precedent and otherwise did not involve questions of law that are of central importance to the legal system outside its expertise. The standard of review must be reasonableness.

B. *Context*

[169] The broader context in which the flyers were published included, among other things, a history of discrimination against those of same-sex orientation and the relatively recent recognition of their equality rights and protection as a vulnerable group; public policy debates about the appropriate content of public school curriculum; and ongoing religious and public interest and debates about the morality of same-sex conduct.

[170] Before reviewing the Tribunal's decision, I would comment on three concerns raised by the Court of Appeal in relation to how the Tribunal and the Court of Queen's Bench dealt with the context of the case. Unlike the appellate court, I do not find that the Tribunal unreasonably failed to give proper weight to the importance of protecting expression that is part of an ongoing debate on sexual morality and public policy. Nor do I find the Tribunal's approach unreasonable in isolating certain

excerpts from the flyers for examination, or in finding that the flyers criticize sexual orientation and not simply sexual behaviour.

[171] As discussed, that the rights of a vulnerable group are a matter of ongoing discussion does not justify greater exposure by that group to hatred and its effects. This is because the only expression which should be caught by s. 14(1)(*b*) of the *Code* is hate-inspiring expression that adds little value to political discourse or to the quest for truth, self-fulfillment, and an embracing marketplace of ideas.

[172] Once the appellate court in the present case determined that Mr. Whatcott's flyers were a polemic on public policy issues, it essentially precluded any finding that the expression in question constituted hate speech. This was especially so when the court rejected the relevancy of the inflammatory nature of the language used. In my respectful view, this approach was in error.

[173] The appellate court also expressed concern about the manner in which the Tribunal isolated certain excerpts from Mr. Whatcott's flyers and then proceeded to determine that they evidenced a contravention of s. 14(1)(*b*) of the *Code*. The court warned that it was not enough that particular words or phrases might be considered to meet the definition of hatred.

[174] I agree that the words and phrases in a publication cannot properly be assessed out of context. The expression must be considered as a whole, to determine the overall impact or effect of the publication. However, it is also legitimate to

proceed with a closer scrutiny of those parts of the expression which draw nearer to the purview of s. 14(1)(*b*) of the *Code*. In most cases, the overall context of the expression will affect the presentation, tone, or meaning of particular phrases or excerpts. However, a dissertation on public policy issues will not necessarily cleanse passages within a publication that would otherwise contravene a hate speech prohibition: *Kempling v. College of Teachers (British Columbia)*; *Snyder v. Phelps*.

[175] In my view, it was not unreasonable for the Tribunal in this case to isolate the phrases it considered to be in issue. If, despite the context of the entire publication, even one phrase or sentence is found to bring the publication, as a whole, in contravention of the *Code*, this precludes publication of the flyer in its current form.

[176] Finally, unlike the Court of Appeal, I do not accept Mr. Whatcott's submission that the flyers targeted sexual activities, rather than sexual orientation. While the publications at issue may appear to engage in the debate about the morality of certain sexual behaviour, they are only aimed at that sexual activity when it is carried out by persons of a certain sexual orientation. They do not deal with the same sexual acts when carried out by heterosexual partners. For example, the word "sodomy" in the flyers is not used in relation to sexual acts in general, but only the sexual act as between men. This is clear by Mr. Whatcott's reference to "sodomites and lesbians" and "learning how wonderful it is for two men to sodomize each other" (Flyer D).

[177] Genuine comments on sexual activity are not likely to fall into the purview of a prohibition against hate. If Mr. Whatcott's message was that those who engage in sexual practices not leading to procreation should not be hired as teachers or that such practices should not be discussed as part of the school curriculum, his expression would not implicate an identifiable group. If, however, he chooses to direct his expression at sexual behaviour by those of a certain sexual orientation, his expression must be assessed against the hatred definition in the same manner as if his expression was targeted at those of a certain race or religion.

C. *The Tribunal's Decision*

[178] The Tribunal acknowledged the approach mandated by the Saskatchewan Court of Appeal in *Bell* to restrict the application of s. 14(1)(*b*) to the *Taylor* definition of hatred. The application of the hatred definition, as modified by these reasons, questions whether a reasonable person, aware of the relevant context and circumstances, would view the representations as exposing or likely to expose a person or class of persons to detestation or vilification on the basis of a prohibited ground of discrimination. The application must also take the objectives of the *Code* into account.

[179] In my view, the Tribunal was aware that the test to be applied was an objective one. Although it devoted considerable time to summarizing evidence on the impact of the flyers on the various complainants, this was relevant to the issue of compensation to be provided pursuant to s. 31.4(*a*) and (*b*) of the *Code*. After

summarizing the evidence of expert witnesses and of Mr. Whatcott, the Tribunal acknowledged that Mr. Whatcott's intention in distributing the flyers was irrelevant. Noting that the application of an objective test by the Board of Inquiry in *Owens* had been confirmed by the Court of Queen's Bench in that case, the Tribunal went on to hold, in respect of each flyer, that it had no hesitation in concluding "that the material contained therein can objectively be viewed as exposing homosexuals to hatred and ridicule" (paras. 51-53).

[180] The Tribunal was also aware that the legislative objectives of the *Code* must be kept in mind in applying the prohibition in s. 14(1)(*b*). It noted Dickson C.J.'s observation, at p. 930 of *Taylor*, that clauses confirming the importance of freedom of expression, like s. 14(2) of the *Code*, indicate to tribunals "the necessity of balancing the objective of eradicating discrimination with the need to protect free expression" (para. 55).

[181] It remains to determine whether the Tribunal applied s. 14(1)(*b*) in a manner consistent with the ardent and extreme nature of feelings constituting "hatred" that was emphasized in *Taylor*.

[182] The Tribunal isolated certain passages from each of the flyers. In regard to Flyer D, it found that the combined references in six phrases "clearly exposes or tends to expose [homosexuals] to hatred, ridicules, belittles or otherwise affronts their dignity on the basis of their sexual orientation" (para. 51):

> . . . children . . . learning how wonderful it is for two men to sodomize each other;
>
> Now the homosexuals want to share their filth and propaganda with Saskatchewan's children;
>
> degenerated into a filthy session where gay and lesbian teachers used dirty language to describe lesbian sex and sodomy to their teenage audience;
>
> ex-Sodomites and other types of sex addicts who have been able to break free of their sexual bondage and develop wholesome and healthy relationships;
>
> sodomites and lesbians who want to remain in their lifestyle and proselytize vulnerable young people that civil law should discriminate against them;
>
> Our children will pay the price in disease, death, abuse . . . if we do not say no to the sodomite desire to socialize your children into accepting something that is clearly wrong.

[183] The Tribunal made an identical finding with respect to the following passages from Flyer E (para. 50):

> Sodomites are 430 times more likely to acquire Aids and 3 times more likely to sexually abuse children!;
>
> Born Gay? No Way! Homosexual sex is about risky and addictive behaviour!;
>
> If Saskatchewan's sodomites have their way, your school board will be celebrating buggery too!;
>
> Don't kid your selves; homosexuality is going to be taught to your children and it won't be the media stereotypes of two monogamous men holding hands;
>
> The Bible is clear that homosexuality is an abomination;

> Sodom and Gomorrah was given over completely to homosexual perversion and as a result destroyed by God's wrath;
>
> Our acceptance of homosexuality and our toleration of its promotion in our school system will lead to the early death and morbidity of many children.

[184] Finally, the Tribunal found that Flyers F and G also exposed homosexuals to hatred and ridicule based on the following two phrases (para. 53):

> Saskatchewan's largest gay magazine allows ads for men seeking boys!;
>
> If you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea.

[185] The Tribunal indicated that it considered evidence as a pattern or practice of disregard of rights under s. 31(4) of the *Code*. It held that in distributing the materials in Saskatchewan between September 2001 and April 2002, Mr. Whatcott had shown a clear pattern or practice of disregard for protected rights. The Tribunal added that it would have reached the same conclusion taking the flyers individually.

[186] In my view, whether applying the *Taylor* definition of "hatred" or the definition as modified by these reasons, the Tribunal's conclusions with respect to Flyers D and E were reasonable.

[187] Passages of Flyers D and E combine many of the "hallmarks" of hatred identified in the case law. The expression portrays the targeted group as a menace that could threaten the safety and well-being of others, makes reference to respected

sources (in this case the Bible) to lend credibility to the negative generalizations, and uses vilifying and derogatory representations to create a tone of hatred: see *Warman v. Kouba*, at paras. 24-81. It delegitimizes homosexuals by referring to them as filthy or dirty sex addicts and by comparing them to pedophiles, a traditionally reviled group in society.

[188] Some of the examples of the hate-inspiring representations in flyers D and E are phrases such as: "Now the homosexuals want to share their filth and propaganda with Saskatchewan's children"; "degenerated into a filthy session where gay and lesbian teachers used dirty language to describe lesbian sex and sodomy to their teenage audience"; "proselytize vulnerable young people"; "ex-Sodomites and other types of sex addicts"; and "Homosexual sex is about risky & addictive behaviour!". The repeated references to "filth", "dirty", "degenerated" and "sex addicts" or "addictive behaviour" emphasize the notion that those of same sex orientation are unclean and possessed with uncontrollable sexual appetites or behaviour. The message which a reasonable person would take from the flyers is that homosexuals, by virtue of their sexual orientation, are inferior, untrustworthy and seek to proselytize and convert our children.

[189] The flyers also seek to vilify those of same-sex orientation by portraying them as child abusers or predators. Examples of this in Flyers D and E would include: "Our children will pay the price in disease, death, abuse . . ."; "Sodomites are 430 times more likely to acquire Aids & 3 times more likely to sexually abuse

children!"; and "Our acceptance of homosexuality and our toleration [*sic*] of its promotion in our school system will lead to the early death and morbidity of many children".

[190] Whether or not Mr. Whatcott intended his expression to incite hatred against homosexuals, in my view it was reasonable for the Tribunal to hold that, by equating homosexuals with carriers of disease, sex addicts, pedophiles and predators who would proselytize vulnerable children and cause their premature death, Flyers D and E would objectively be seen as exposing homosexuals to detestation and vilification.

[191] Part of assessing whether expression contravenes s. 14(1)(*b*) of the *Code*, is whether the expression not only exposes or tends to expose the vulnerable group to detestation and vilification, but also, when viewed objectively and in its context, has the potential to lead to discriminatory treatment of the targeted group. Overt advocacy of discriminatory treatment is neither necessary nor sufficient to establish that expression exposes a protected group to hatred. However, it can be an important factor in assessing the context of the expression and its likely effects.

[192] In the instant case, Flyers D and E expressly call for discriminatory treatment of those of same-sex orientation. Flyer D urges that the rights of homosexuals and lesbians should be reduced by stating: "We also believe that for sodomites and lesbians who want to remain in their lifestyle and proselytize vulnerable young people that civil law should discriminate against them" (emphasis

added). Flyer E urges: "Our acceptance of homosexuality and our toleration of its promotion in our school system will lead to the early death and morbidity of many children" (emphasis added). Mr. Whatcott therefore combined expression exposing homosexuals to hatred with expression promoting their discriminatory treatment. In my view, it was not unreasonable for the Tribunal to conclude that this expression was more likely than not to expose homosexuals to hatred.

[193] I would therefore allow the appeal, overturn the Court of Appeal's conclusion on this point, and reinstate the Tribunal's decision as to Flyers D and E.

[194] However, in my view, the Tribunal's decision with respect to Flyers F and G was unreasonable. The Tribunal erred by failing to apply s. 14(1)(*b*) in accordance with the *Taylor* directive (requiring feelings of an ardent and extreme nature so as to constitute hatred), or in accordance with the interpretation of s. 14(1)(*b*) prescribed in *Bell* (essentially reading out the words "ridicules, belittles or otherwise affronts the dignity"). By failing to apply the proper legal test to the facts before it, the Tribunal's determination that those flyers contravened s. 14(1)(*b*) was unreasonable and cannot be upheld.

[195] Flyers F and G are identical, and are comprised mainly of a reprint of a page of the classified advertisements from a publication called *Perceptions*. Printed by hand in bold print at the top of the page are the words "Saskatchewan's largest gay magazine allows ads for men seeking boys". Although there were conflicting views expressed on whether the references in the ads in question to "any age"; "boys/men";

or "[y]our age . . . is not so relevant" were in fact a reference to men seeking children (as Mr. Whatcott meant to imply by his additional biblical reference), the true purpose and meaning of the personal ads are, for our purposes, irrelevant. Mr. Whatcott also added the handwritten words: "'If you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea' Jesus Christ" and "[t]he ads with men advertising as bottoms are men who want to get sodomized. This shouldn't be legal in Saskatchewan!".

[196] In my view, it cannot reasonably be found that Flyers F and G contain expression that a reasonable person, aware of the relevant context and circumstances, would find as exposing or likely to expose persons of same-sex orientation to detestation and vilification. Reproduction of the ads themselves, and the statement as to how the ads could be interpreted as "men seeking boys", do not manifest hatred. The implication that the ads reveal men seeking under-aged males, while offensive, is presented as Mr. Whatcott's interpretation of what the ads mean. He insinuates that this is a means by which pedophiles can advertise for victims, but the expression falls short of expressing detestation or vilification in a manner that delegitimizes homosexuals. The expression, while offensive, does not demonstrate the hatred required by the prohibition.

[197] With respect to the purported excerpt from the Bible, I would agree with the comments of Richards J.A., at para. 78 of *Owens*, that

> . . . it is apparent that a human rights tribunal or court should exercise care in dealing with arguments to the effect that foundational religious writings violate the *Code*. While the courts cannot be drawn into the business of attempting to authoritatively interpret sacred texts such as the Bible, those texts will typically have characteristics which cannot be ignored if they are to be properly assessed in relation to s. 14(1)(b) of the *Code*.

[198] Richards J.A. found that objective observers would interpret excerpts of the Bible with an awareness that it contains more than one sort of message, some of which involve themes of love, tolerance and forgiveness. He also found that the meaning and relevance of the specific Bible passages cited in that case could be assessed in a variety of ways by different people.

[199] In my view, these comments apply with equal force to the biblical passage paraphrased in Flyers F and G that "[i]f you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea". Whether or not Mr. Whatcott meant this as a reference that homosexuals who seduced young boys should be killed, the biblical reference can also be interpreted as suggesting that anyone who harms Christians should be executed. The biblical passage, in and of itself, cannot be taken as inspiring detestation and vilification of homosexuals. While use of the Bible as a credible authority for a hateful proposition has been considered a hallmark of hatred, it would only be unusual circumstances and context that could transform a simple reading or publication of a religion's holy text into what could objectively be viewed as hate speech.

[200] The Tribunal did not find fault with the handwritten words: "This shouldn't be legal in Saskatchewan!". It is unclear whether these words refer to the ads or to homosexuality itself. However, even if, viewed objectively, the words were to be interpreted as calling for homosexuality to be illegal, the statement is not combined with any representations of detestation and vilification delegitimizing those of same-sex orientation. Rather, as the Court of Appeal determined, these flyers are potentially offensive but lawful contributions to the public debate on the morality of homosexuality.

[201] The Tribunal may have been misguided by its approach of considering "the evidence as a pattern or practice of disregard of rights secured under the *Code* as permitted by s. 31(4)" (para. 54). Evidence of a person's pattern or practice of disregard for protected rights cannot render a publication offside the prohibition under s. 14(1)(*b*), if that publication would not have been found to be so on an individual basis. Such an interpretation of the legislation would be an unacceptable restriction on freedom of expression. Although the Tribunal indicated that it would have reached the same view if it had taken each flyer individually, in my respectful view, it could not reasonably have reached that result by applying the proper legal test. A reasonable person, aware of the context and circumstances and making an individual assessment of Flyers F and G would not conclude that they expose homosexuals to detestation and vilification.

[202] Having found the Tribunal's decisions with respect to Flyers F and G unreasonable, I would uphold the Court of Appeal's conclusion that those two flyers do not contravene s. 14(1)(*b*) of the *Code*.

D. *Remedy*

[203] The Tribunal awarded compensation of $2,500 to Guy Taylor and $5,000 to each of James Komar, Brendan Wallace, and Kathy Hamre. The Tribunal awarded James Komar, Brendan Wallace, and Kathy Hamre double the compensation of Guy Taylor because their complaints fell under legislation introduced after Mr. Taylor had submitted his complaint. This new legislation doubled the limit on compensation and the Tribunal thus thought it appropriate to double the compensation of those three complainants.

[204] From my reading of the Tribunal's reasons, it awarded compensation based on the harm caused by the receipt of the flyers by the individuals. The Agreed Statement of Facts filed with the Tribunal indicates that Guy Taylor received Flyer D, James Komar Flyer E, Brendan Wallace Flyer F, and Kathy Hamre Flyer G.

[205] Given my finding that Flyers F and G do not constitute hate speech under s. 14(1)(*b*) of the *Code* and the fact that the compensation was based on the receipt of the flyers, I would not reinstate the compensation awarded to Brendan Wallace and Kathy Hamre. The compensation awards of $2,500 to Guy Taylor and $5,000 to

James Komar, as well as the prohibition on further distribution of Flyers D and E, are reinstated.

X. Conclusion

[206] Section 14(1)(*b*) is a reasonable limit on freedom of expression and freedom of religion, demonstrably justified in a free and democratic society. I would therefore answer the constitutional questions as presented in the January 5, 2011 order of the Chief Justice as follows:

1. Does s. 14(1)(*b*) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, infringe s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: A prohibition of any representation that "ridicules, belittles or otherwise affronts the dignity of" any person or class of persons on the basis of a prohibited ground is not a reasonable limit on freedom of religion. Those words are constitutionally invalid and are severed from the statutory provision in accordance with these reasons. The remaining prohibition of any representation "that exposes or tends to expose to hatred" any person or class of persons on the basis of a prohibited ground is a reasonable limit and demonstrably justified in a free and democratic society.

3. Does s. 14(1)(*b*) of *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: A prohibition of any representation that "ridicules, belittles or otherwise affronts the dignity of" any person or class of persons on the basis of a prohibited ground is not a reasonable limit on freedom of expression. Those words are constitutionally invalid and are severed from the statutory provision in accordance with these reasons. The remaining prohibition of any representation "that exposes or tends to expose to hatred" any person or class of persons on the basis of a prohibited ground is a reasonable limit and demonstrably justified in a free and democratic society.

[207] I would therefore allow the appeal in part, and reinstate the Tribunal's decision as to Flyers D and E. I would dismiss the appeal with respect to Flyers F and G. Given that Mr. Whatcott was found in contravention of the *Code*, the Commission is awarded costs throughout, including costs of the application for leave to appeal in this Court.

APPENDIX A

Relevant Statutory Provisions

The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1

2. – (1) In this Act:

. . .

(*m.01*) "prohibited ground" means:

. . .

(vi) sexual orientation;

. . .

3. The objects of this Act are:

(*a*) to promote recognition of the inherent dignity and the equal inalienable rights of all members of the human family; and

(*b*) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

4. Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.

5. Every person and every class of persons shall, under the law, enjoy the right to freedom of expression through all means of communication, including, without limiting the generality of the foregoing, the arts, speech, the press or radio, television or any other broadcasting device.

. . .

14. – (1) No person shall publish or display, or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device, or in any printed matter or publication or by means of any other medium that the person owns, controls, distributes or sells, any representation, including any notice, sign, symbol, emblem, article, statement or other representation:

(*a*) tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons, on the basis of a

prohibited ground, of any right to which that person or class of persons is entitled under law; or

(*b*) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

(2) Nothing in subsection (1) restricts the right to freedom of expression under the law upon any subject.

. . .

31. – . . . (4) Without restricting the generality of subsection (2), a human rights tribunal shall, on an inquiry, be entitled to receive and accept evidence led for the purpose of establishing a pattern or practice of resistance to or disregard or denial of any of the rights secured by this Act, and the human rights tribunal shall be entitled to place any reliance that it considers appropriate on the evidence and on any pattern or practice disclosed by the evidence in arriving at its decision.

. . .

32. – (1) Any party to a proceeding before a human rights tribunal may appeal on a question of law from the decision or order of the human rights tribunal to a judge of the Court of Queen's Bench by serving a notice of motion, in accordance with *The Queen's Bench Rules*, within 30 days after the decision or order of the tribunal, on:

(*a*) the human rights tribunal;

(*b*) the commission; and

(*c*) the other parties in the proceedings before the human rights tribunal.

Canadian Human Rights Act, S.C. 1976-77. c. 33

13. (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

[This section was repealed by Bill C-304 - *An Act to amend the Canadian Human Rights Act* (protecting freedom), though it has not yet received Royal Assent - 1st Sess., 41st Parl., 2012.]

Canadian Charter of Rights and Freedoms:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour,

religion, sex, age or mental or physical disability.

APPENDIX B

Keep Homosexuality out of Saskatoon's Public Schools !

It has come to the attention of the Christian Truth Activists that a committee on "Gay, Lesbian, Bisexual and Transgendered Issues," set up by the Saskatoon Public School Board has recommended that information on homosexuality be included in their curriculum and school libraries. The elementary school teacher's union in Ontario voted this year in favour of this for grades 3 and 4, even though children at this age are more interested in playing Barbie & Ken rather than learning how wonderful it is for two men to sodomize each other. Children in Ontario perform poorly in terms of academics, however, their teachers seem more interested in sexual politics of a perverted type, rather than preparing children to do well when they are older. Now the homosexuals want to share their filth and propaganda with Saskatchewan's children. They did it in Boston, under the guise of "Safe Schools" and their little sensitivity class degenerated into a filthy session where gay and lesbian teachers used dirty language to describe lesbian sex and sodomy to their teenage audience.*

Christian Truth Activists believes that Sodomites and lesbians can be redeemed if they repent and ask Jesus Christ to come into their lives as Lord and Saviour. The Church of Jesus Christ is blessed with many ex -Sodomites and other types of sex addicts who have been able to break free of their sexual bondage and develop wholesome and healthy relationships. We also believe that for sodomites and lesbians who want to remain in their lifestyle and proselytize vulnerable young people that civil law should discriminate against them. In 1968 it was illegal to engage in homosexual acts, now it is almost becoming illegal to question any of their sick desires. Our children will pay the price in disease, death, abuse and ultimately eternal judgment if we do not say no to the sodomite desire to socialize your children into accepting something that is clearly wrong.

Sincerely: Bill Whatcott
Christian Truth Activists
To contact us call: (306) 949-0818
e-mail: Jesus.w@accesscomm.ca

To let the public school authorities know that you don't want Saskatchewan's children corrupted by sodomite propaganda call the school board at: [redacted] or fax at: [redacted]

Please call your local trustee as well to let them know they will be gone next election if they vote for implementing any homosexual propaganda in the children's curriculum.

** To find out what happened in Boston: phone [redacted] or go to: http://www.americansfortruth.com/opening_remarks_by_peter_labarbe.htm*

eak the Silence!
orn Gay? No way!
mosexual sex is
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Sodomites in our Public Schools

Break the Silence!
Sodomites are 430 times more likely to acquire Aids & 3 times more likely to sexually abuse children!

Toronto Gay Pride Parade, June. 2001

We should be holding conferences on how to reinstate Canada's sodomy laws! Not on how guys like this can be better accepted as your children's teachers. The Toronto Public School Board marches every year in this parade. If Saskatchewan's sodomites have their way, your school board will be celebrating buggery too!

Dear Friends:

The University of Saskatchewan is hosting the 5th annual "Breaking the Silence conference." Some of their workshops have titles like, "It's a drag doing drag in teacher education." Another workshop is named "Getting an Education in Edmonton, Alberta: The case for Queer Youth." Don't kid your selves; homosexuality is going to be taught to your children and it won't be the media stereotypes of two monogamous men holding hands.

The Bible is clear that homosexuality is an abomination. "Be not deceived neither fornicators, nor idolaters, nor adulterers, nor sodomites will inherit the kingdom of heaven." 1 Cor 6:9. Romans 1 talks of women giving up natural relations for unnatural ones and men being inflamed in lust for other men. The behaviour in Canada's gay parades is no different than what has happened thousands of years a go, whether it is ancient Rome or Sodom and Gomorrah. Scripture records that Sodom and Gomorrah was given over completely to homosexual perversion and as a result destroyed by God's wrath. Rome also crumbled and many scholars attribute it's moral decadence and lack of discipline as playing a role in her demise.

Canada in its quest for freedom from sexual restraint is following the path of ancient Rome. Our acceptance of homosexuality and our toleration of its promotion in our school system will lead to the early death and morbidity of many children. Ultimately our entire culture will be lost and we will incur the wrath of Almighty God if we do not repent. But there is still hope. We can repent and have our sins forgiven, "Come now, and let us reason together, says the Lord, Though your sins are as scarlet they shall be as white as snow; though they are as red as crimson, they shall be like wool," Isa 1:18. Even though conferences like Breaking the Silence refuse to acknowledge it, every year across North America, thousands of sodomites and lesbians find redemption and healing through the grace and mercy that is found by turning to Jesus Christ the Lord and giver of life.

Sincerely: Bill Whatcott, Christian Truth Activists Phone: (306) 949-0818,
Email jesus.w@accesscomm.ca

If the promotion of sodomy in your school system concerns you call: [redacted] *and let him and ultimately all of Saskatchewan know:* [redacted]

Saskatchewan's largest gay magazine allows ads for men seeking boys!

The ads with men advertising as bottoms are men who want to get sodomized. This shouldn't be legal in Saskatchewan!

"If you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea" Jesus Christ

Bill Whatcott
Christian Truth Activists
949-0818 / jesus.w@accesscomm ca

CLASSIFIEDS

PERCEPTIONS Classifieds cost $9.00 for the first 25 words (1st form) and $6.00 for each extra 25 words (or extra form). Use the form to the right, or a plain piece of paper, and print clearly your ad. If you wish to have a PERCEPTIONS Drawer # to receive replies add $3.00 per ad.

Save money and increase your replies by advertising in more than one issue. If you pay for your ad to run three times we'll run it the fourth time free. Or pay for your ad to run six times and we'll run it two extra issues (8 times).

All classifieds must be paid in advance by cheque or money order.

Send your ad form along with proper payment to PERCEPTIONS Classifieds, Box 8581, Saskatoon, SK, S7K 6K7. Include your name and address as well as the category you wish your ad to run under.

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WRITE CLEARLY IN THE SPACES PROVIDED. ONE WORD PER SPACE. YOUR FIRST THREE WORDS WILL BE IN BOLD TYPE.

FORM 1 - $9.00 EXTRA FORM - $6.00

IN MEMORIAM

ANNOUNCEMENTS

Do you live in the country? Do you have livestock? Are you lonely? Perhaps you'd like to join "Out in the Country"? This is a group of gay men and women who live on the prairies, and in the country, who like to meet and share country experiences. If interested write: Out in the Country, Box 10, Ravenscrag, SK S0N 0T0 or call (306) 295-4124.

VOLUNTEERS

GAY & LESBIAN HEALTH SERVICES needs you to become a volunteer!! We're expanding our programs, many of which need volunteers like you to help them be successful. Call Garnet at 665-1224 to register for next training workshop.

PERCEPTIONS is on the lookout for volunteers for many tasks. If you're a writer, photographer, artist or you'd like to help with distribution or advertising sales (we pay a commission) contact Gens at 306-244-1930.

EMPLOYMENT

Ranch hand needed for year round employment on ranch in Southwest Sask. Must have valid drivers license. Good wages plus room and board. Phone 306-299-4985. 1$1

ACCOMMODATIONS

Have you got a house, apartment or suite for rent? Trying to sell your house? Looking for a new place to live? Call Gens at 306-244-01930 to place your ad here!

GROUPS

Coming to Edmonton? Before you do check out the Gay Men's Wednesday Coffee Evenings web page for our upcoming events. http://www.geocities.com/gaycoffee. 1$1

SERVICES

DO YOU RUN A SMALL SERVICE BUSINESS? Call (306) 244-1930 to find out how you can reach new customers by advertising in *Perceptions*.

ARTICLES FOR SALE

YOUR AD COULD APPEAR HERE INFORMING GAYS & LESBIAN ACROSS THE PRAIRIES ABOUT YOUR SERVICES. CALL 306-244-1930 TO DISCOVER HOW TO REACH 1000s OF NEW CUSTOMERS FOR A LOW RATE.

CONTACTS - FEMALE

LINKING LESBIANS ON LINE Free Correspondence Club. For information email: frostbyte@sprint.ca 1$1

CONTACTS - MALE

Saskatoon/Regina male, handsome, 37, seeks friendship and more with attractive male under 40. Non-smoker, health and fun loving. Let's meet and explore. Reply to Perceptions Drawer S8101. 1$1

Saskatoon GWM, 35, 235 lbs, 6'7", blue eyes, wants to meet other GWMs 35 - 50 for fun times, movies, bowling, fulfilling fantasies, outgoing, fun and loving. Reply Perceptions Drawer S8201. 1$1

Edmonton GWM 39, 5'10", 160 lbs, easy going, fit bottom with varied interests, looking for a romantic, caring, taller top, any age, who enjoys passion, closeness and a healthy sex drive as much as I do, for short or longterm. Reply to Drawer # A1301. 1$1

35 yr old health care professional looking for that special person for friendship & possibly relationship. I'm down to earth, loyal & have a bizarre sense of humour. Looking for that special person to spend quality time with. Perceptions Drawer S7701. 1$1

GWM, 25, 6', 165#, dark hair, blue eyes, looking for males 30 - 45 for friendship, possible relationship. If you enjoy movies & long walks, good communication & are adventurous reply to Percep Drawer S7601. 1$1

Mature & experienced top in Saskatoon looking for bottoms for fun adventures and possible LTR. I enjoy soft/cuddly sex, hot/kinky times, role playing, & helping people explore fantasies. Ability to communicate openly a requirement. Drawer S7501 1$1

I'm 28, 160#, searching for boys/men for penpals, friendship, exchanging video, pics, magazines & anything more. Your age, look & nationality is not so relevant. Write me at KW "Spirit", Postlagernd, PA 1134 Vienna, Austria.

WGM, early 50's, looking for other genuine WGMs for possible relationship. I am a NS, social drinker & enjoy lots of great bottom sex. I am into drag & quite attractive when performing. Also like viewing home erotica movies & cottage life. Can entertain at my Regina residence if desired. Reply Perceptions Drawer S7901. 1$1

Are you a rancher? Need someone to cook, housekeep, take care of yard or have a 2nd house and need someone to live in and care for it and yard? I will exchange for board and room or rent and utilities. GWM, 62. Call [redacted] 1$1

Saskatoon gay white male, mid 30's, 5'8", 150 lbs, looking to connect with guy(s) mid 30's and over for clean healthy uninhibited fun. Reply Perceptions Drawer S8106. 1$1

Emmanuel, 25, 5'9", 170#, black, enjoys video, music, sports, visits, tour, etc, looking for a gay guy to fulfill his fantasies, looking for a caring & compassionate guy for a sweet lasting relationship. PO Box MS.5, New Achimota-Accra, GHANA, W/A or email: ekow606@yahoo.com.

Saskatchewan's largest gay magazine allows ads for men see king boys!

"If you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea" Jesus Christ

The ads with men advertising as bottoms are men who want to get sodamized. This shouldn't be legal in Saskatchewan!

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EMPLOYMENT

Ranch hand needed for year round employment on ranch in Southwest Sask. Must have valid drivers license. Good wages plus room and board. Phone 306-299-4985. 151

ACCOMMODATIONS

Have you got a house, apartment or suite for rent? Trying to sell your house? Looking for a new place to live? Call Gens at 306-244-01930 to place your ad here!

GROUPS

Coming to Edmonton? Before you do check out the Gay Men's Wednesday Coffee Evenings web page for our upcoming events. http://www.geocities.com/gaycoffee. 151

SERVICES

DO YOU RUN A SMALL SERVICE BUSINESS? Call (306) 244-1930 to find out how you can reach new customers by advertising in *Perceptions*.

ARTICLES FOR SALE

YOUR AD COULD APPEAR HERE INFORMING GAYS & LESBIAN ACROSS THE PRAIRIES ABOUT YOUR SERVICES. CALL 306-244-1930 TO DISCOVER HOW TO REACH 1000s OF NEW CUSTOMERS FOR A LOW RATE.

CONTACTS - FEMALE

LINKING LESBIANS ON LINE Free Correspondence Club. For information email: frostbyte@sprint.ca 151

CONTACTS - MALE

Saskatoon/Regina male, handsome, 37, seeks friendship and more with attractive male under 40. Non-smoker, health and fun loving. Let's meet and explore. Reply to Perceptions Drawer SE101. 151

Saskatoon GWM. 35, 235 lbs, 6'7". blue eyes, wants to meet other GWMs 35 - 50 for fun times, movies, bowling, fulfilling fantasies, outgoing, fun and loving. Reply Perceptions Drawer S8201. 151

Edmonton GWM 39, 5'10" 160 lbs, easy going, fit bottom with varied interests, looking for a romantic, caring, taller top, any age, who enjoys passion, closeness and a healthy sex drive as much as I do, for short or longterm. Reply to Drawer# A1301. 151

35 yr old health care professional looking for that special person for friendship & possibly relationship. I'm down to earth, loyal & have a bizarre sense of humour. Looking for that special person to spend quality time with. Perceptions Drawer S7701. 151

GWM, 25, 6', 165#, dark hair, blue eyes, looking for males 30 - 45 for friendship, possible relationship. If you enjoy movies & long walks, good communication & are adventurous reply to Percep Drawer S7601. 151

Mature & experienced top in Saskatoon looking for bottoms for fun adventures and possible LTR. I enjoy soft/cuddly sex, hot/kinky times, role playing, & helping people explore fantasies. Ability to communicate openly a requirement. Drawer S7501. 151

I'm 28, [illegible]6, searching for boys/men for pen[illegible] friendship, exchanging video, pics, magazines & anything more. Your age, look & nationality is not so relevant. Write me at KW "Spirit", Postlagernd, PA 1134 Vienna, Austria.

WGM, early 50's looking for other genuine WGMs for possible relationship. I am a NS, social drinker & enjoy lots of great bottom sex. I am into drag & quite attractive when performing. Also like viewing home erotica movies & cottage life. Can entertain at my Regina residence if desired. Reply Perceptions Drawer S7901. 151

Are you a rancher? Need someone to cook, housekeep, take care of yard or have a 2nd house and need someone to live in and care for it and yard? I will exchange for board and room or rent and utilities, GWM, 62[redacted] 134

Saskatoon gay white male, mid 30's, 5'8", 150 lbs, looking to connect with guy(s) mid30's and over for clean healthy uninhibited fun. Reply Perceptions Drawer S8106. 131

Emmanuel, 25, 5'9", 170#, black, enjoys video, music, sports, visits, tour, etc, looking for a gay guy to fulfill his fantasies, looking for a caring & compassionate guy for a sweet lasting relationship. PO Box MS.5, New Achimota-Accra, GHANA, W/A or email: ekow606@yahoo.com.

FREE ADS!
MAKE NEW FRIENDS
Send us your personal classified ad by April 15 2002 & the first 25 words are free; $6.00 for each additional 25 words; $3.00 for a Drawer #.
SEND YOUR AD TODAY!

Appeal allowed in part.

Solicitors for the appellant: Scharfstein Gibbings Walen Fisher, Saskatoon; Saskatchewan Human Rights Commission, Saskatoon.

Solicitors for the respondent: Nimegeers, Schuck, Wormsbecker & Bobbitt, Weyburn, Saskatchewan; Iain Benson, Toronto; John Carpay, Calgary; Mol Advocates, Edmonton.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Canadian Constitution Foundation: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitor for the intervener the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitor for the intervener the Alberta Human Rights Commission: Alberta Human Rights Commission, Edmonton.

Solicitors for the intervener Egale Canada Inc.: Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the Ontario Human Rights Commission: Ontario Human Rights Commission, Toronto.

Solicitors for the intervener the Canadian Jewish Congress: Lerners, Toronto.

Solicitors for the intervener the Unitarian Congregation of Saskatoon and the Canadian Unitarian Council: Fasken Martineau DuMoulin, Calgary.

Solicitors for the intervener Women's Legal Education and Action Fund: Jo-Ann R. Kolmes, Edmonton; University of Calgary, Calgary.

Solicitor for the intervener the Canadian Journalists for Free Expression: Stockwoods, Toronto.

Solicitors for the intervener the Canadian Bar Association: David Matas, Winnipeg.

Solicitors for the interveners the Northwest Territories Human Rights Commission and the Yukon Human Rights Commission: MacPherson Leslie & Tyerman, Saskatoon.

Solicitors for the intervener the Christian Legal Fellowship: Bennett Jones, Toronto.

Solicitors for the intervener the League for Human Rights of B'nai Brith Canada: Dale, Streiman & Kurz, Brampton.

Solicitor for the intervener the Evangelical Fellowship of Canada: Evangelical Fellowship of Canada, Ottawa.

Solicitors for the intervener the United Church of Canada: Symes & Street, Toronto.

Solicitors for the interveners the Assembly of First Nations, the Federation of Saskatchewan Indian Nations and the Métis Nation-Saskatchewan: McKercher, Saskatoon.

Solicitors for the intervener the Catholic Civil Rights League and the Faith and Freedom Alliance: Bull, Housser & Tupper, Vancouver.

Solicitors for the intervener the African Canadian Legal Clinic: African Canadian Legal Clinic, Toronto; University of Toronto, Toronto.